



United States Government Accountability Office  
Washington, DC 20548

November 12, 2010

Congressional Requesters

Subject: *Deepwater Horizon Oil Spill: Preliminary Assessment of Federal Financial Risks and Cost Reimbursement and Notification Policies and Procedures*

On April 20, 2010, an oil spill of national significance in the Gulf of Mexico followed an explosion on the mobile offshore drilling unit *Deepwater Horizon* (the *Deepwater Horizon* oil spill). The *Deepwater Horizon* was leased by BP America Production Company (BP) as part of the Macondo project.<sup>1</sup> 152 days later, on September 19, 2010, BP confirmed the completion of cementing operations to prevent further oil from spilling from the Macondo Prospect well to which the *Deepwater Horizon* was attached when it exploded. In order to coordinate the federal response to the *Deepwater Horizon* oil spill, the National Incident Commander established the Deepwater Integrated Services Team (IST) consisting of 18 federal agencies, including the U.S. Coast Guard and the Department of Justice (DOJ).

The U.S. Coast Guard's National Pollution Funds Center (NPFC) designated two BP subsidiaries—BP Exploration and Production and its guarantor, BP Corporation North America, Inc.—and five other companies as “Responsible Parties” for *Deepwater Horizon* oil spill related claims. Shortly after the spill, at the direction of NPFC, BP established a facility to receive and process all claims against Responsible Parties. In June 2010, as part of an oral agreement between the administration and BP, BP established a new claims processing facility—the Gulf Coast Claims Facility (GCCF). GCCF began operations on August 23, 2010, and is responsible for handling claims from individuals and businesses for damages resulting from the *Deepwater Horizon* oil spill. BP also established an irrevocable trust (Trust), to which BP is to provide a total of \$20 billion by 2014, primarily for the purpose of paying GCCF and other claims related to the *Deepwater Horizon* oil spill.<sup>2</sup> (Enclosure IV provides a timeline of *Deepwater Horizon* oil spill events.)

The total cost to clean up this massive and potentially unprecedented spill, the damage to the environment, as well as the potential impact to the livelihood and economic status of businesses and individuals in the region will undoubtedly be significant, with current estimates from BP and Oxford Economics in the tens of billions of dollars.<sup>3</sup> However, the full extent of such costs and

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<sup>1</sup>BP America Production Company, a subsidiary of BP p.l.c., leased the *Deepwater Horizon* from Transocean Holdings LLC, a subsidiary of Transocean Limited. Transocean Limited is the world's largest offshore drilling contractor comprising numerous subsidiaries and jointly controlled entities and associates. Unless otherwise referring to specific subsidiaries or affiliates, we refer to Transocean Limited and its components separately or jointly as “Transocean.” BP p.l.c. is an international oil and gas company comprising numerous subsidiaries and jointly controlled entities and associates. Unless otherwise referring to specific subsidiaries or affiliates, we refer to BP p.l.c. and its components separately or jointly as “BP.” BP was originally incorporated in 1909 in England and Wales as “British Petroleum” and changed its name in 2001.

<sup>2</sup>BP established the trust under Delaware law, which generally provides that the principal of the trust can be used only for the purposes stated in the trust agreement and that the terms of the trust agreement cannot be modified and are legally enforceable by the trustees.

<sup>3</sup>BP, BP p.l.c. Group results, second quarter and half year 2010, London, July 27, 2010 and Oxford Economics, *Potential Impact of the Gulf Oil Spill on Tourism*, July 22, 2010.

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the extent to which they will ultimately be paid by the Responsible Parties or federal, state, and local governments is unknown at this time and depends on a variety of factors.

The complex legal framework in place for oil spill liability and response funding will play an integral role in determining who is responsible and will ultimately pay the costs associated with the *Deepwater Horizon* oil spill. In this regard, the Oil Pollution Act of 1990,<sup>4</sup> as amended (OPA), which Congress enacted after the *Exxon Valdez* spill in 1989, authorized use of the Oil Spill Liability Trust Fund (Fund), which is administered by NPFC and is subject to certain caps on the amount of its expenditures. The Fund was established to pay for certain oil spill cleanup costs and damages using federal tax revenues for immediate response costs and when the Responsible Parties cannot be identified or do not pay. OPA also provided that the federal government may subsequently seek reimbursement for these costs from Responsible Parties.<sup>5</sup> Since the *Deepwater Horizon* oil spill, a number of related legislative proposals have been introduced. For example, in May 2010, the administration made several proposals including increasing the caps on payments from the Fund and obtaining express authority to oversee Responsible Parties' claims processing.

The objectives of this study were to provide a preliminary assessment of (1) financial risks and exposures to the Fund and the federal government as a result of the *Deepwater Horizon* oil spill, and (2) Coast Guard's NPFC cost reimbursement policies and procedures for *Deepwater Horizon* oil spill costs. In addition, we provide a description of the framework for federal monitoring and oversight efforts over the Responsible Parties for the *Deepwater Horizon* oil spill, including federal efforts to oversee BP's and GCCF's *Deepwater Horizon* oil spill claims payments. This product is the first of a planned body of work to evaluate and assess the federal risks and exposures resulting from the *Deepwater Horizon* oil spill. Our follow on work is to include assessing and testing NPFC Fund reimbursement policies and procedures and analyzing the framework for federal monitoring and oversight efforts over the Responsible Parties for the *Deepwater Horizon* oil spill.

## Scope and Methodology

To identify and provide a preliminary assessment of the financial risks to the Fund and the federal government as a result of the *Deepwater Horizon* oil spill, we identified and analyzed applicable laws and regulations and reviewed our previous work on the cost of oil spills to identify statutory and regulatory limitations on the liability of Responsible Parties that may pose financial risks to the Fund and federal government to the extent that *Deepwater Horizon* oil spill claims exceed such limits.<sup>6</sup>

To provide a preliminary assessment of the design of NPFC's reimbursement process, we interviewed NPFC officials, performed walkthroughs, and conducted a review of NPFC's documented policies and procedures. We also obtained invoices NPFC sent to the Responsible Parties to reimburse the Fund and analyzed Fund billings from federal and state agencies. Our assessment was preliminary in that we did not test the reimbursement invoices to determine their accuracy or eligibility under OPA.

To provide an overview of the framework for federal monitoring and oversight of BP's claims payment process, we interviewed DOJ officials and other cognizant federal and state officials regarding coordination of federal government agencies efforts to monitor and oversee BP's claims process and payment activities. We did not evaluate the effectiveness of federal

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<sup>4</sup>Pub. L. No. 101-380, 104 Stat. 489 (1990).

<sup>5</sup>The Fund also pays for the costs of certain federal agency operations.

<sup>6</sup>This work focused on the *Deepwater Horizon* oil spill. Our past work identified a number of other risks and vulnerabilities to the fund. For example, the Fund is at risk from claims resulting from spills that significantly exceed responsible parties' liability limits. See GAO, *Maritime Transportation: Major Oil Spills Occur Infrequently, but Risks to the Federal Oil Spill Fund Remain*, GAO-07-1085 (Washington, D.C.: Sept. 7, 2007).

monitoring and oversight efforts over BP's claims process and the GCCF. (Enclosure II provides further details of our scope and methodology.)

On November 9, 2010, we briefed your staff on the results of our work. This letter summarizes the information provided during the briefing. The briefing slides are provided in enclosure I.

We conducted this performance audit from July 2010 to October 2010, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## Summary of Results

Because the total costs of the *Deepwater Horizon* oil spill are still unknown, the federal government's financial exposure as a result of the oil spill is also unknown. Additionally, the fiscal exposure of the federal government resulting from the *Deepwater Horizon* oil spill could increase as Responsible Parties' capacity to cover oil spill-related costs is reduced whether as a result of extensive oil spill liabilities, poor financial condition, or other factors. BP has voluntarily established a Trust to be funded incrementally up to \$20 billion, has paid other costs outside of the Trust, and has stated that it will continue to pay additional costs. BP's financial condition and its continuing resolve to stand behind its public commitments will be key factors if additional costs need to be paid.

Certain statutory limits on the amount of federal funds available for response costs and damages are intended to mitigate the exposure. For example, OPA establishes caps on the amount of funds that can be expended on each oil spill. (Enclosure III discusses the statutory liability and response framework associated with oil spills.)

NPFC has billed the Responsible Parties for the *Deepwater Horizon* oil spill \$581 million for response activities performed by nine federal government agencies and various state government agencies. After NPFC authorizes reimbursement, the government agencies are paid from the Fund for actual expenditures. BP has paid NPFC \$518.4 million as of October 12, 2010. The Fund is at risk of reaching the OPA-established \$1 billion per incident cap on total expenditures in the relatively near future.<sup>7</sup> Consequently, unless the statute is amended to exclude amounts reimbursed by Responsible Parties from the cap, the Fund may be unable to pay any OPA-compensable claims or other *Deepwater Horizon* oil spill-related costs above that limit.<sup>8</sup>

Our preliminary assessment of the design of Coast Guard's NPFC's policies and procedures for obtaining reimbursement for *Deepwater Horizon* oil spill costs found they did not always reflect current practices and were not sufficiently detailed to ensure they could be followed consistently. For example, NPFC's procedures for identifying and notifying Responsible Parties are dated 1996, when the Coast Guard was part of Department of Transportation, and are marked "draft." Also, in responding to the ongoing nature of the costs associated with the *Deepwater Horizon* oil spill, NPFC changed its practice of billing Responsible Parties from solely billing for federal agencies' expenditures to also including an amount reflecting a percentage of federal agencies' obligations.<sup>9</sup> Although it began using this new billing practice in June 2010, as of

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<sup>7</sup>The \$1 billion per incident cap applies concurrently with a \$500 million per incident cap for natural resource damages and related assessment costs. The administration submitted a legislative proposal to Congress in May 2010 to increase the caps to \$1.5 billion and \$750 million per incident, respectively, to address the effects of inflation since the caps were enacted in 1990.

<sup>8</sup>If, as for the *Deepwater Horizon* oil spill, the Fund is being fully reimbursed and net expenditures are zero, the cap still applies.

<sup>9</sup>An obligation is a commitment, such as a contract, that creates a legal liability for the payment of goods and services ordered or received.

October 4, 2010, NPFC had not yet updated its policies and procedures manual to reflect this new practice. Further, the Department of Defense (DOD) has been using Military Interdepartmental Purchase Requests (MIPR) to provide NPFC with its requests for cost reimbursement since 1990. As a matter of practice, NPFC has been accepting and processing DOD requests for *Deepwater Horizon* oil spill cost reimbursements using MIPRs. However, NPFC has not documented its practices for these requests in its current policies and procedures manual, which would help ensure these practices are fully and consistently followed. NPFC is at risk of these procedures being out of date and not reflecting management's current directives. In addition, existing procedures for implementing NPFC's policy requiring formal notification to Responsible Parties were not consistent. Consequently, we found that NPFC procedures followed in notifying the *Deepwater Horizon* oil spill Responsible Parties were not always effective. For example, a *Deepwater Horizon* oil spill Responsible Party stated during a July 2010 hearing that his company had not received notification of designation.

The federal government has been involved in overseeing Responsible Parties' claims processing resulting from the *Deepwater Horizon* oil spill. Following the spill, DOJ, the Department of Homeland Security (DHS) and various other federal agencies have been overseeing the establishment of a claims process and monitoring claims processing activities by BP on behalf of the designated Responsible Parties. For example, DOJ encouraged BP to set aside substantial resources to protect federal interests related to *Deepwater Horizon* claims payment. Further, in September 2010, DOJ notified GCCF's administrator of its dissatisfaction regarding GCCF's pace of processing *Deepwater Horizon* oil spill claims, and urged GCCF to devote additional resources (or make administrative changes as necessary) to meet its own claims processing timeliness standards. In addition, DOJ is helping to coordinate investigations of fraudulent claims associated with the *Deepwater Horizon* oil spill. The DHS, through its component agencies—the Coast Guard and the Federal Emergency Management Agency—was also engaged in various *Deepwater Horizon* oil spill-related claims processing oversight and monitoring activities. For example, the Coast Guard, in its capacity as the Federal On-Scene Coordinator for the *Deepwater Horizon* oil spill verified whether costs incurred for removal were consistent with the National Contingency Plan (NCP).<sup>10</sup>

In addition to DHS, over 15 federal agencies have been involved in overseeing Responsible Parties' efforts to address the effects of the *Deepwater Horizon* oil spill through their participation in the Deepwater IST. The Deepwater IST was established to, among other things, coordinate the federal government's oversight of BP's claims processing to avoid duplicate payments. However, as of September 30, 2010, the Deepwater IST was to transfer ongoing oversight to appropriate federal agencies or workgroups.

## Conclusion

Financial risks exist for the federal government as a result of the *Deepwater Horizon* oil spill. Total costs associated with the oil spill are unknown, but estimates are in the tens of billions of dollars. BP has committed to paying costs from the *Deepwater Horizon* oil spill, even to the extent that such costs exceed the \$20 billion it has agreed to set aside for such costs. OPA places limits on the liability of the Responsible Parties, but BP has stated that it will continue to pay costs above the limits applicable to the *Deepwater Horizon* oil spill. However, financial risks to the federal government exist if circumstances occur that adversely impact BP or other Responsible Parties' financial condition or ability to pay such claims. As such, it remains unclear whether the federal government will ultimately have to cover *Deepwater Horizon* oil spill-related costs, and if so, the potential amounts that could be involved.

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<sup>10</sup>The NCP is a national plan maintained by the Environmental Protection Agency (EPA) that provides the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants. Appendix E to the NCP provides the organizational structure and procedures to prepare for and respond to oil spills.

Consequently, in order to help minimize federal financial risks associated with the *Deepwater Horizon* oil spill, it will be imperative that the federal government take prompt action to ensure that its policies and procedures are up-to-date, clear, and sufficiently detailed. Further, going forward, sustained federal oversight and monitoring—including establishing mechanisms to ensure that policies and procedures are fully and effectively implemented—and enacting legislation concerning the \$1 billion per incident cap will be essential.

### **Matter for Congressional Consideration**

Congress should consider amending OPA or enacting new legislation that eliminates the Fund's \$1 billion per incident expenditure cap to the extent that it does not take into account reimbursements from Responsible Parties. In this regard, Congress may want to consider setting a Fund cap associated with an incident based upon net expenditures (expenditures less reimbursements).

### **Recommendations for Executive Action**

In order to help establish and maintain effective cost reimbursement policies and procedures for the Fund, we recommend that the Secretary of Homeland Security direct the Director of the U.S. Coast Guard's NPFC to update NPFC's policies and procedures to include

- current Fund reimbursement billing practices that reflect both a percentage of federal agencies' obligations as well as expenditures, and
- specific procedural guidance on processing DOD requests for reimbursement using MIPRs.

In order to ensure that all Responsible Parties are properly notified of their responsibilities for an oil spill, we recommend that the Secretary of Homeland Security direct the Director of NPFC to

- update NPFC's current policies to reflect current organization and structure and managements' directives, and
- update NPFC's current procedures to provide detailed guidance and procedures for identifying and documenting all Responsible Party notifications.

### **Agency Comments**

We provided a draft of our slides to DHS, the Department of the Interior, and DOJ's management for comment. We received written comments from the Special Assistant, Office of the Chief Financial Officer, DHS, which are contained in enclosure V. We also received a subsequent email from DHS providing additional comments related to GAO's four recommendations. DOJ provided technical comments which we considered and incorporated as appropriate. The Department of the Interior did not provide any comments.

In its written comments, DHS agreed with our matter for congressional consideration of revising the current \$1 billion per incident cap and cited a May 2010 request to increase the per incident cap to \$1.5 billion. With respect to our recommendations, DHS stated that while its existing policies and procedures are sound to address many oil spills, the significance of the *Deepwater Horizon* spill highlights the need for adopting policy refinements. Accordingly, DHS agreed to update NPFC's current policies to reflect current organization and structure and stated it will further evaluate and analyze our recommendation to update NPFC's Fund reimbursement billing policies and procedures.

However, DHS commented that no additional actions were needed with respect to two of our recommendations. We disagree. For our recommendation to provide specific procedural guidance on processing DOD requests for reimbursements using MIPRs, DHS stated that existing legally binding bilateral agreements with documented procedures are already in place. However, NPFC's *User Reference Guide* does not address procedures for processing MIPRs, nor does it provide specific examples on how to complete a MIPR or provide guidance on when a MIPR

should be used. With respect to our recommendation to provide detailed guidance and procedures for identifying and documenting all Responsible Parties notifications, DHS viewed our recommendation as being directed toward using such formal notifications in determining Responsible Parties' liability. While we recognize that the purpose of the notice of designation is to help ensure Responsible Parties advertise the claims process as quickly as possible, we believe that failure to provide prompt formal notifications may result in confusion, hindering Responsible Parties' compliance with cost recovery processes. Consequently, we continue to believe that actions are needed to implement all four of our recommendations.

DHS's comments also included a number of technical suggestions concerning our findings which we considered and incorporated as appropriate in finalizing our product. For example, we added clarification concerning DHS actions to deliver designation notices to all potential Responsible Parties.

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We are sending copies of this report to the appropriate congressional committees. We are also sending copies to the Secretary of Homeland Security, the Director of NPFC, the Attorney General of the United States, and to other interested parties. This report will also be available at no charge on our Web site at <http://www.gao.gov>. Should you or your staff have any questions concerning this report, please contact Susan Ragland at (202) 512-9095 or [raglands@gao.gov](mailto:raglands@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in enclosure VI.



Susan Ragland  
Director  
Financial Management and Assurance

Enclosures - 6

*List of Requesters*

The Honorable John Conyers, Jr.  
Chairman  
Committee on the Judiciary  
House of Representatives

The Honorable Nick J. Rahall, II  
Chairman  
Committee on Natural Resources  
House of Representatives

The Honorable Tom Carper  
Chairman  
Subcommittee on Federal Financial Management, Government Information, Federal Services,  
and International Security  
Committee on Homeland Security and Governmental Affairs  
United States Senate

The Honorable Sheldon Whitehouse  
Chairman  
Subcommittee on Oversight  
Committee on Environment and Public Works  
United States Senate

The Honorable Michael C. Burgess  
Ranking Member  
Subcommittee on Oversight and Investigations  
Committee on Energy and Commerce  
House of Representatives





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## ***Deepwater Horizon* Oil Spill: Preliminary Assessment of Federal Financial Risks and Cost Reimbursement and Notification Policies and Procedures**

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Briefing for Congressional Requesters

November 9, 2010

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- Background
  - Objectives
  - Scope and Methodology
  - Results
    - The Fund and Federal Government Face a Variety of Financial Risks as a Result of the *Deepwater Horizon* Oil Spill
    - Federal Policies and Procedures Not Current, Clear, and Sufficiently Detailed
    - Federal Government Efforts to Monitor and Oversee Responsible Parties' Claims Processing
  - Conclusions
  - Matter for Congressional Consideration
  - Recommendations for Executive Action
  - Agency Comments and Our Evaluation

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- On April 20, 2010, an oil spill of national significance followed an explosion on the *Deepwater Horizon* mobile offshore drilling unit located in the Gulf of Mexico.<sup>11</sup> Cementing operations to prevent further oil from spilling from the Macondo Prospect well was completed on September 19, 2010. (See enclosure IV for a timeline of *Deepwater Horizon* oil spill events.)
  - A complex landscape of laws and regulations governs the liability for oil spill costs of different parties.
    - Injuries and damages that arise from an oil spill incident are governed by federal statutes and common law, federal securities laws, and various state laws.
    - For example, the Oil Pollution Act of 1990 (OPA), as amended,<sup>12</sup> places the primary liability for the cost of the oil spills—up to certain limits—on the Responsible Party or Parties and establishes the limits on liability of Responsible Parties for removal costs and damages specified in OPA (referred to as OPA compensable damages).<sup>13</sup>
  - The U.S. Coast Guard’s National Pollution Funds Center (NPFC) administers the Oil Spill Liability Trust Fund (Fund) by disbursing funds for federal cleanup and natural resource restoration, monitoring the sources and uses of the Funds, adjudicating claims submitted to the Fund for payment, and pursuing reimbursements from Responsible Parties for costs and damages paid by the Fund and certain other recoverable costs.
  - Under OPA, the authorized limit on expenditures to be paid by the Fund is currently \$1 billion in total expenditures per incident, with a concurrent limit of \$500 million per incident for natural resource damage assessments and claims. According to the Department of Homeland Security, federal agencies may separately incur costs and fund them with agency appropriations, if available for that purpose.

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<sup>11</sup> An oil spill is deemed to be of national significance if “due to its severity, size, location, actual or potential impact on the public health and welfare or the environment, or the necessary response effort, is so complex that it requires extraordinary coordination of federal, state, local, and responsible party resources to contain and clean up the discharge.”

<sup>12</sup> Pub. L. No. 101-380, 104 Stat. 489 (1990).

<sup>13</sup> Enclosure III presents the liability limits.

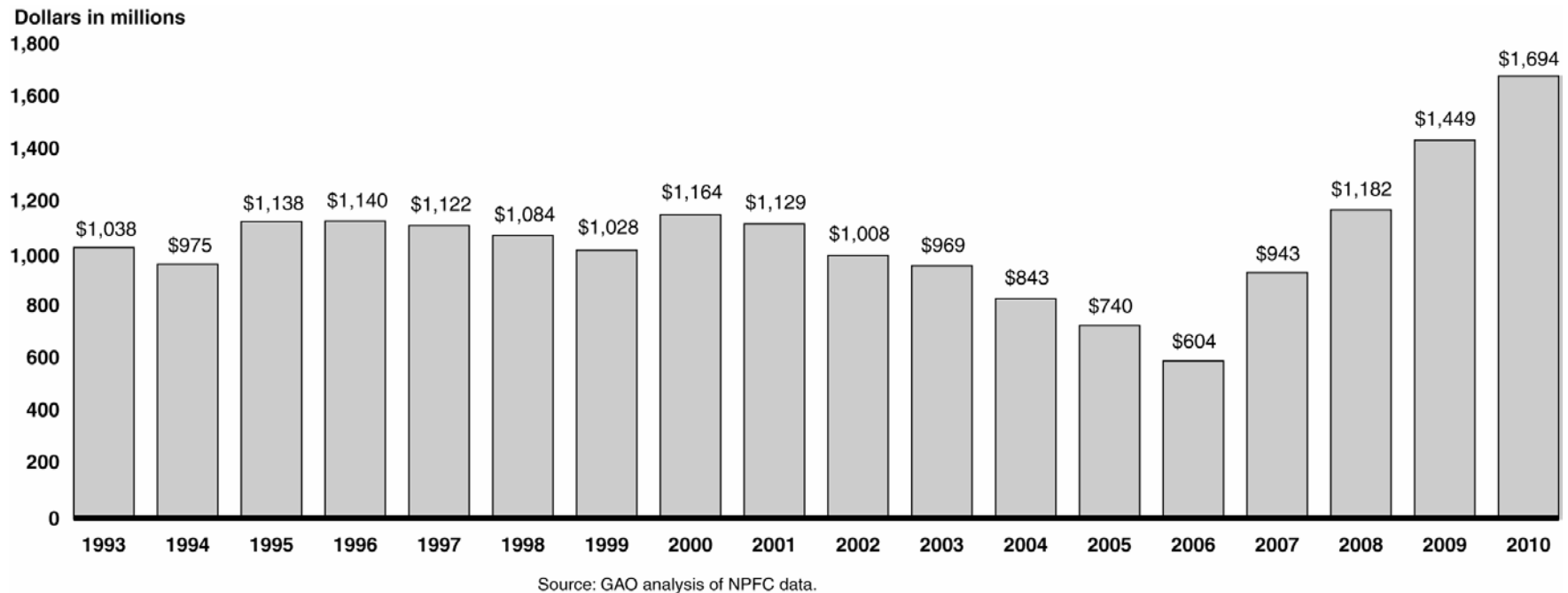
## Background – Oil Spill Liability Trust Fund

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- The Fund's current revenue sources include
  - a per barrel tax of 8 cents on petroleum products either produced in the United States or imported from other countries,
  - recoveries from Responsible Parties for costs of removal and damages,
  - fines and penalties paid pursuant to various statutes, and
  - interest earned on U.S. Treasury investments.
- As shown in figure 1, the Fund's balance has varied over the years.
  - For fiscal years 2003 through 2007, its balance was less than the \$1 billion limit on expenditures for the response to a single spill. This was in part because the Fund's per barrel tax on U.S. produced and imported oil was not collected for most of 1995 through 2006, because the barrel tax had expired in December 1994. The Energy Policy Act of 2005 reinstituted the 5 cents per barrel tax on produced and imported oil in April 2006, which the Energy Improvement and Extension Act of 2008 subsequently increased to 8 cents per barrel.<sup>14</sup> On September 30, 2010, the unaudited Fund balance was \$1.69 billion.

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<sup>14</sup>In 2017, the per barrel tax increases to 9 cents; however, the tax is scheduled to expire at the end of 2017.

**Background – Oil Spill Liability Trust Fund (cont.)****Figure 1: Oil Spill Liability Trust Fund Balance, 1993–2010 (Unaudited)**

Note: The Fund balance increase in 2000 was largely because of a transfer of \$181.8 million from the Trans-Alaska Pipeline Liability Fund.

## Background – Federal Agencies’ Roles

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- Responding to oil spills involves a coordinated effort by various parties, including (1) Coast Guard or Environmental Protection Agency (EPA) as the Federal On-Scene Coordinator;<sup>15</sup> (2) federal, state, local, and Indian tribal government agencies; (3) private companies that specialize in oil spill clean up;<sup>16</sup> and (4) the Responsible Parties, their guarantors (i.e., insurers), and qualified individuals designated by responsible parties to respond to oil spills.
- To fund government agencies’ oil spill removal costs, the Federal On-Scene Coordinators
  - issue Pollution Removal Funding Authorizations (federal authorizations) or Military Interdepartmental Purchase Requests (MIPR)<sup>17</sup> to quickly obtain services and assistance from government agencies,
  - verify that the services or goods were received and consistent with the National Contingency Plan and certify the supporting cost documentation, and
  - send the cost documentation to NPFC, which authorizes the Coast Guard’s Finance Center to pay the government agencies.

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<sup>15</sup>The Coast Guard has responsibility for removal actions in the coastal zone, while EPA has responsibility in the inland zone. Because the *Deepwater Horizon* oil spill occurred in the Gulf of Mexico, the Coast Guard is the Federal On-Scene Coordinator for the incident.

<sup>16</sup>Oil Spill Response Organizations (OSROs) are companies that specialize in cleaning up oil spills. They often serve as contractors or subcontractors for spill response efforts.

<sup>17</sup>Federal authorizations authorize reimbursement of federal and nonfederal government agencies from the Fund for oil response and removal activities. NPFC uses MIPRs rather than federal authorizations for the Department of Defense, to authorize reimbursement.

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## Background –Trust and Gulf Coast Claims Facility

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- The Coast Guard, without in any way relieving other Responsible Parties of liability, directed BP to establish a single claims facility for all Responsible Parties to centralize claims processing for claimants.<sup>18</sup>
- On June 16, 2010, BP announced that it would create a \$20 billion escrow account to satisfy claims resolved by the Gulf Coast Claims Facility (GCCF) and certain other claims, including natural resource damages.
- BP established an irrevocable Trust (for the announced escrow account) on August 6, 2010, designating three trustees<sup>19</sup> with fiduciary responsibility to collect promised contributions from BP and make disbursements to permitted categories of beneficiaries. It committed BP to fund the Trust on a quarterly basis over 3-1/2 years for a total of \$20 billion to be paid into the Trust as of 2014 (as shown in figure 2).<sup>20</sup> The Trust is to pay some OPA-compensable claims and some other claims for personal injuries that are not OPA-compensable, but for which BP would be liable under other federal or state laws, such as the Jones Act or state oil pollution acts.<sup>21</sup>
- BP established the GCCF to provide a mechanism for individuals and businesses to file claims for costs and damages incurred as a result of the *Deepwater Horizon* oil spill. The GCCF began operations and started accepting claim forms on August 23, 2010. The GCCF, administered by Kenneth R. Feinberg, draws funds from the Trust to pay claims.

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<sup>18</sup>On May 11, 2010, NPFC notified BP and Transocean Holdings Incorporated that BP's advertising and claims processing were sufficient, and Transocean should not advertise and should coordinate claims processing with BP. According to NPFC officials, they wanted to avoid public confusion and have only one Responsible Party advertise for claims.

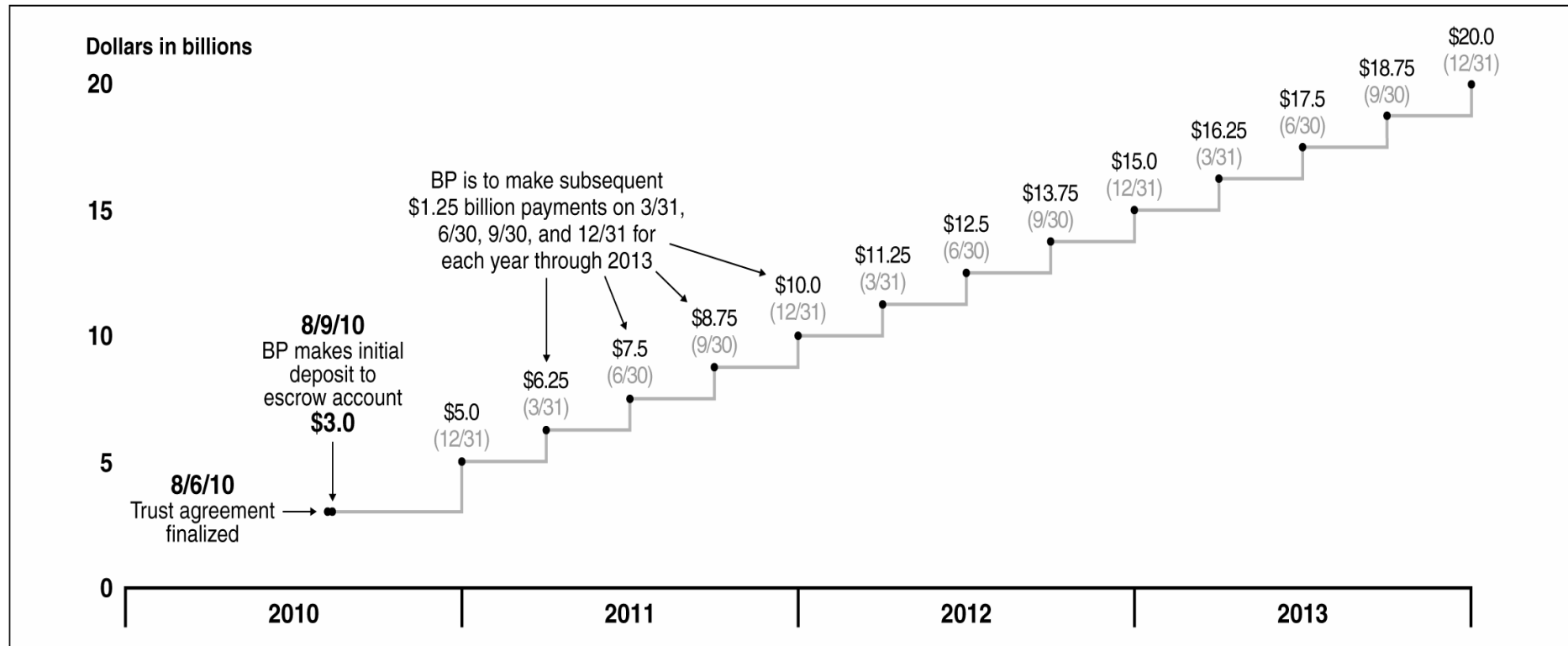
<sup>19</sup>The three trustees are Citigroup Trust-Delaware, N.A., which serves as the corporate trustee, and John S. Martin, Jr. and Kent D. Syverud, who serve as the individual trustees.

<sup>20</sup>The funding schedule for the escrow account agreed to by the administration and BP was for contributions by BP of \$5 billion a year for 4 years. BP later confirmed that the funding schedule would include an initial deposit of \$3 billion, which was made on August 9, 2010, with an additional deposit of \$2 billion in the fourth quarter of 2010 and \$1.25 billion a quarter until the entire \$20 billion has been deposited.

<sup>21</sup>The Jones Act 46 U.S.C. § 30104, establishes liability for injury or death of seamen incurred in the course of their employment.

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Figure 2: The Trust's \$20 Billion Funding Time Frame



Source: GAO analysis of an August 9, 2010, BP press release on the funding of the \$20 billion account.



## Background – Gulf Coast Claims Facility

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- The GCCF Administrator has established the following principles for GCCF's operations:
  - GCCF officials are to evaluate all claims in a prompt and fair manner guided by applicable law,
  - The establishment of the GCCF does not diminish any right of any individual or business that existed prior to the GCCF's creation, and
  - The GCCF claims process has been structured to comply with OPA and apply the standards of OPA. In addition, it will consider some non-OPA-compensable claims, such as those for physical injuries, that are based on applicable federal or state laws.
- As of August 2010, GCCF has established the following types of payments:
  - Emergency Advance Payments. Payments available to individuals and businesses that are experiencing financial hardship resulting from damages incurred from the *Deepwater Horizon* oil spill. According to GCCF Emergency Advance Payment protocols, claims for Emergency Advance Payments can be submitted through November 23, 2010.
  - Final Payments. Payments, over and above any emergency advance payments, to individuals and businesses for total losses incurred because of the *Deepwater Horizon* oil spill. According to the Frequently Asked Questions on GCCF's Web site,<sup>22</sup> the GCCF will be accepting claims for Final Payments that are submitted through August 23, 2013.
- These payments are intended to provide compensation for both OPA-compensable and non-OPA-compensable claims.

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<sup>22</sup>See <http://www.gulfcoastclaimsfacility.com/> (as of October 4, 2010, GCCF had not yet issued protocols for final claim payments).

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- Our objectives for this briefing are to
    - provide a preliminary assessment of financial risks to the Fund and the federal government as a result of the *Deepwater Horizon* oil spill;
    - provide a preliminary assessment of the Coast Guard's NPFC cost reimbursement policies and procedures for *Deepwater Horizon* oil spill costs; and
    - describe the framework for federal monitoring and oversight efforts over the Responsible Parties for the *Deepwater Horizon* oil spill, including federal efforts to oversee BP's and GCCF's *Deepwater Horizon* oil spill claims payments.

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- To address these objectives, we
    - identified and analyzed applicable laws and regulations and our previous work<sup>23</sup> to identify statutory and regulatory limitations on the liability of Responsible Parties that may pose risks to the Fund and federal government;
    - interviewed Fund officials, performed walkthroughs, reviewed and summarized invoices sent to the Responsible Parties for reimbursement, and reviewed relevant policies and procedures to make a preliminary assessment of the Fund's cost reimbursement policies and procedures; and
    - interviewed Department of Justice (DOJ) and Deepwater Integrated Services Team (IST) officials and reviewed relevant coordination and status updates to obtain an understanding of federal monitoring and oversight of BP's claims payment activities.
  - This product is the first of a planned body of work to evaluate and assess the federal risks and exposures resulting from the *Deepwater Horizon* oil spill. Our follow on work is to include assessing and testing NPFC Fund reimbursement policies and procedures and analyzing the framework for federal monitoring and oversight efforts over the Responsible Parties for the *Deepwater Horizon* oil spill.
  - We conducted this performance audit from July 2010 to October 2010, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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<sup>23</sup>GAO, *Maritime Transportation: Major Oil Spills Occur Infrequently, but Risks to the Federal Oil Spill Fund Remain*, GAO-07-1085 (Washington, D.C.: Sept. 7, 2007).

## The Fund and Federal Government Face a Variety of Financial Risks as a Result of the *Deepwater Horizon* Oil Spill

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- According to BP's second quarter 2010 projections, the *Deepwater Horizon* oil spill is projected to result in tens of billions of dollars in cleanup, restoration, loss of income, property damage, and other costs.<sup>24</sup>
- BP stated publicly and in filings in federal district court that it will pay all costs related to the *Deepwater Horizon* oil spill, even if costs exceed the statutory limit on its liability for costs of oil spilled from the Macondo Prospect Well (removal costs plus \$75 million).<sup>25</sup>
- As of October 15, 2010, NPFC had sent seven bills to the *Deepwater Horizon* Responsible Parties for a cumulative total of \$581 million. These bills are primarily to reimburse federal government costs, but also include some other costs, such as the National Guard. BP has stated its intent to recover some of these costs from the other Responsible Parties under the provisions of OPA or applicable contractual agreements.
- NPFC officials told us that they expect the Fund to reach the \$1 billion per incident cap at some point for the *Deepwater Horizon* oil spill, but the timeframe for this is uncertain.<sup>26</sup>
- Federal agencies incurring removal and certain other costs related to the *Deepwater Horizon* oil spill face risks as costs increase. If the agencies incur OPA-compensable costs that collectively exceed the \$1 billion per incident cap on total expenditures from the Fund, the statute would need to be amended to exclude from the cap amounts recovered from the Responsible Parties in order to obtain reimbursements from the Fund for their costs incurred.<sup>27</sup> Additionally, federal agencies may need to use their annual appropriations or other agency budgetary resources to cover non-reimbursable costs.

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<sup>24</sup>BP, *BP p.l.c. Group results, second quarter and half year 2010*, London, July 27, 2010.

<sup>25</sup>Whether the *Deepwater Horizon* oil spill arose as the result of gross negligence, willful misconduct, or a violation of federal operation, safety, or construction regulations remains subject to investigation and potential litigation.

<sup>26</sup>The cap is for total expenditures. If, as for the *Deepwater Horizon* oil spill, the Fund is being fully reimbursed and net expenditures are zero, the cap still applies.

<sup>27</sup>The \$1 billion cap is concurrent with a \$500 million cap on expenditures for natural resource damages and related assessments. It is not just the federal government that is at risk as a result of the cap. In addition, no claims may be paid for private parties' or states' damages and removal costs.

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## **The Fund and Federal Government Face a Variety of Financial Risks as a Result of the *Deepwater Horizon* Oil Spill (cont.)**

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- The \$581 million billed to the Responsible Parties includes \$323.3 million for Pollution Removal Funding Authorizations (Federal Authorizations) and MIPRs and \$44.0 million for Coast Guard direct costs, such as those for purchases, contractors, and travel. The amounts billed also include \$213.7 million for Coast Guard recoverable, or indirect, costs, such as personnel and equipment.
  - The \$581 million billed to the Responsible Parties does not necessarily reflect expenditures from the Fund.
    - For example, although NPFC bills the Responsible Parties for 75 percent of the Federal Authorization and MIPR ceilings, agencies are reimbursed by the Fund for actual expenditures incurred. The agencies submit cost reimbursement packages with costs incurred to NPFC for approval for reimbursement from the Fund. Not all of the agencies that have incurred costs have submitted cost reimbursement packages to NPFC. According to information provided by NPFC, as of October 19, 2010, NPFC has authorized for reimbursement, approximately \$125.5 million, or 38.8 percent of the amount billed to the Responsible Parties for Federal Authorizations and MIPRs.
    - Additionally, the Coast Guard recoverable costs are funded through the agency's annual operating expenses appropriation, and the Coast Guard has not sought reimbursement for these costs from the Fund.<sup>28</sup> Therefore, the \$213.7 million is not applied to the \$1 billion statutory limit, although the Fund benefits from reimbursements from Responsible Parties.<sup>29</sup>
    - The \$581 million does not include any amounts for natural resource damage assessment initiation costs, although NPFC has an interagency agreement with the Department of the Interior for about \$22.4 million for the initiation assessment.<sup>30</sup>

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<sup>28</sup> According to the agency, the Coast Guard has historically viewed its OPA recoverable costs as activities normally funded through the agency's operating expense appropriation, and thus it has not sought reimbursement for these costs from the Fund.

<sup>29</sup> Amounts recovered from the Responsible Parties for Coast Guard recoverable costs are deposited into the Fund.

<sup>30</sup> According to NPFC officials, any amounts paid to the Natural Resource Trustee will be billed to the Responsible Parties.

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## **The Fund and Federal Government Face a Variety of Financial Risks as a Result of the *Deepwater Horizon* Oil Spill (cont.)**

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- Further, since the total cost of the *Deepwater Horizon* oil spill has yet to be determined, the federal government remains at risk of having to pay relevant costs above the \$20 billion planned to fund the Trust if circumstances change. BP's financial condition and its continuing resolve to stand behind its public commitments will be key factors if additional costs need to be paid.
  - BP faces a large number of lawsuits, which potentially could result in final judgments or settlements to be paid from the Trust.
  - As of October 21, 2010, according to BP's Web site,<sup>31</sup> it paid a total of \$3,198.5 million to reimburse costs incurred by federal and state governments and pay claims to individuals and businesses associated with the *Deepwater Horizon* oil spill.<sup>32</sup> (See table 1.)
  - The extent of natural resource damages has yet to be determined, which could result in significant additional costs. To provide a frame of reference, the *Exxon Valdez's* natural resource damages were at least \$1 billion. The Fund has a \$500 million statutory limit on natural resource damage assessments and claims.

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<sup>31</sup>See <http://www.bp.com>.

<sup>32</sup>According to GCCF's Web site, emergency payments are payments available to individuals and businesses that are experiencing financial hardship resulting from damages incurred by the *Deepwater Horizon* oil spill. Final payments will be issued for claims that individuals and business have filed for income, damages, and other losses associated with the *Deepwater Horizon* oil spill.

## Enclosure I

# The Fund and Federal Government Face a Variety of Financial Risks as a Result of the *Deepwater Horizon* Oil Spill (cont.)

Table 1: Claims and Government Payments as of October 21, 2010 (Dollars in Millions)

Type	BP direct	Trust	Total
Individuals and businesses	\$395.6	\$1,481.8	<b>\$1,877.4</b>
Fund for real estate brokers and agents		\$34.5	<b>\$34.5</b>
Federal government – response and removal	\$518.4		<b>\$518.4</b>
Federal government - other	\$63.4		<b>\$63.4</b>
States and other	\$564.7	\$140.1	<b>\$704.8</b>
<b>Total Paid</b>	<b>\$1,542.1</b>	<b>\$1,656.4</b>	<b>\$3,198.5</b>

Source: Unaudited data from BP's Web site.

## **Federal Policies and Procedures Not Current, Clear and Sufficiently Detailed**

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- Our preliminary assessment of the design of NPFC policies and procedures over the billings to Responsible Parties noted instances where NPFC had not updated its documented policies and procedures to reflect current NPFC practices in the following areas:
  - its practices for billing the Responsible Parties for this incident,
  - procedures for identifying and notifying Responsible Parties (its *Technical Operating Procedures for Designation of Source*), and
  - the specific steps required for the proper processing of MIPRs, which NPFC has been using since 1990 to reimburse the Department of Defense (DOD) for costs incurred with spills and that NPFC stated it has refined as a result of the *Deepwater Horizon* oil spill.



## Federal Policies and Procedures Not Current, Clear and Sufficiently Detailed (cont.)

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- Because of the ongoing nature of the *Deepwater Horizon* oil spill, NPFC determined that it was necessary to change its practices for billing the Responsible Parties for this incident.
- NPFC developed and implemented a new practice for billing the Responsible Parties for the costs incurred by the Fund. However, NPFC has not updated its policies and procedures to reflect these new practices.
  - Prior to the *Deepwater Horizon* oil spill, NPFC's policy was to bill Responsible Parties for actual expenditures associated with a spill.
  - NPFC developed a new practice for billing the *Deepwater Horizon* oil spill Responsible Parties based on a combination of obligations and actual expenditures.<sup>33</sup>
  - As of October 2010, NPFC had not yet incorporated its new billing practices in its *Case Management Standard Operating Procedures* or other policy manuals.<sup>34</sup>

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<sup>33</sup> An obligation is a commitment, such as a contract, that creates a legal liability for the payment of goods and services ordered or received.

<sup>34</sup> The process, prior to the *Deepwater Horizon* oil spill, was to bill the responsible party based only on actual costs.

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## **Federal Policies and Procedures Not Current, Clear and Sufficiently Detailed (cont.)**

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- NPFC's documented procedures for identifying and notifying Responsible Parties (i.e., its *Technical Operating Procedures for Designation of Source*) are dated 1996 and marked "draft."
  - NPFC's *Technical Operating Procedures* were drafted in 1996 when the Coast Guard was part of the Department of Transportation. Since the procedures were drafted, multiple organizational changes have occurred including Coast Guard becoming part of the Department of Homeland Security in 2003 and the establishment of the Department of Interior's Bureau of Ocean Energy Management, Regulation and Enforcement in June 2010.<sup>35</sup>
  - Since NPFC's *Technical Operating Procedures* were drafted in 1996, it is important that NPFC update them to ensure that they reflect the current organization and structure as well as management's current directives.

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<sup>35</sup>NPFC uses Department of Interior's Bureau of Ocean Energy Management, Regulation and Enforcement's leases to identify some Responsible Parties.

## Federal Policies and Procedures Not Current, Clear and Sufficiently Detailed (cont.)

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- NPFC did not follow its *Technical Operating Procedures* in notifying the *Deepwater Horizon* oil spill Responsible Parties.
  - On April 28, 2010, NPFC sent formal Notices of Designation (advising the companies of BP's and Transocean's<sup>36</sup> obligation to advertise for claims for the *Deepwater Horizon* oil spill) to (1) BP Exploration & Production; (BP), (2) BP's guarantor, BP Corporation North America, Inc.; (3) Transocean Holdings Incorporated (Transocean); and (4) Transocean's guarantor, QBE Underwriting, LTD.
  - However, NPFC officials told us that in the case of the *Deepwater Horizon* oil spill, as of October 2010, NPFC had identified seven Responsible Parties, but had notified three of the Responsible Parties identified—(1) Anadarko E&P Company, LP, (2) Anadarko Petroleum Corporation and (3) MOEX Offshore 2007 LLC—only through invoices sent to recover costs.
  - NPFC *Technical Operating Procedures* provide that Responsible Parties and their guarantors are to be identified and formally notified of their oil spill-related responsibilities through a Notice of Designation.<sup>37</sup> The Notice of Designation states that if the Responsible Party does not deny the designation, then the Responsible Party is required to advertise the procedures by which persons may submit claims.
  - Because multiple parties were involved in the *Deepwater Horizon* oil spill, it is important that NPFC appropriately identify, document, and notify the Responsible Parties involved to ensure that the appropriate Responsible Parties are held responsible for advertising.
- NPFC officials view the Responsible Party designation process as applicable only to the assignment of claims advertising responsibilities under OPA and not as a determination of liability, and the liability of any particular entity will be addressed through investigation and possible litigation. However, NPFC policies and procedures require an assessment of liability in its designation process and NPFC uses responses to its designations in its cost reimbursement process. The failure to follow documented notification procedures creates risks of confusion and breakdowns in the claims management and cost reimbursement process.

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<sup>36</sup> NPFC sent the notice to Transocean Holdings Incorporated, but Transocean replied that the correct entity is Transocean Holdings LLC. Further, Transocean asserted to NPFC that it was a responsible party solely for purposes of any oil that was discharged from the mobile offshore drilling unit *Deepwater Horizon* and not from the Macondo Prospect well.

<sup>37</sup> 33 U.S.C. § 2714(a). Coast Guard regulations authorize NPFC to notify Responsible Parties of their designation through any means, but all designations will be confirmed via written Notice of Designation. 33 C.F.R. § 136.305(a).

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## **Federal Policies and Procedures Not Current, Clear and Sufficiently Detailed (cont.)**

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- NPFC's current policy and procedures manual does not address the specific steps required for the proper processing of MIPRs, which NPFC has been using since 1990 to reimburse DOD for costs incurred responding to oil spills.
  - NPFC's *User Reference Guide*, which contains NPFC's policies and procedures,
    - provides specific examples of Federal Authorizations and when Pollution Removal Funding Authorizations should be used,
    - does not mention MIPRs, and thus does not provide specific examples on how to complete an MIPR or discuss when an MIPR should be used, and
    - provides no information regarding invoicing and reimbursing MIPRs.
- As the result of the *Deepwater Horizon* oil spill, NPFC stated that it has refined its process related to MIPRs and the agency stated that it will be formally documenting and promulgating these refinements.

## **Federal Policies and Procedures Not Current, Clear and Sufficiently Detailed (cont.)**

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- Our *Standards for Internal Control in the Federal Government*<sup>38</sup> provide that internal control and all transactions and other significant events need to be clearly documented and readily available for examination. The documentation should appear in management directives, administrative policies, or operating manuals. All documentation and records should be properly managed and maintained.
- Without clearly documented policies and procedures for dealing with the new and current practices established in response to the *Deepwater Horizon* oil spill, NPFC is at risk of its billing practices not being efficient and effective.

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<sup>38</sup>GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999).

## Federal Government Efforts to Monitor and Oversee Responsible Parties' Claims Processing

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- Federal agencies, including DOJ and the Coast Guard and the Federal Emergency Management Agency (FEMA) within DHS, have participated in monitoring and overseeing the claims and cost reimbursement process for the *Deepwater Horizon* oil spill. In addition, the federal government established the Deepwater IST to lead the government's efforts. The following is additional detail on the roles of the federal agencies:
- DOJ
  - Encouraged BP to establish the Trust and the GCCF.<sup>39</sup>
  - Reviewed and provided written comments on GCCF's *Protocol for Emergency Advance Payment*.
  - Is monitoring GCCF's claims process to determine if it is independent, fair, and efficient.
  - Is coordinating investigations of fraudulent claims and has also begun receiving allegations through its National Center for Disaster Fraud.

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<sup>39</sup>According to White House and BP press releases, the President of the United States and BP "mutually agreed that Mr. Kenneth Feinberg will run the GCCF." According to BP, Mr. Feinberg was jointly appointed by the President and BP to serve as an independent contractor to BP.

## **Federal Government Efforts to Monitor and Oversee Responsible Parties' Claims Processing (cont.)**

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- Coast Guard
  - Acts as the Federal On-Scene Coordinator for the *Deepwater Horizon* oil spill and provides oversight of the response activities.
  - Verifies whether a particular cost was incurred for removal and was consistent with the National Contingency Plan.
- NPFC
  - Designated Responsible Parties and sent Notices of Designation.
  - Generated and sent invoices to Responsible Parties to recover costs.
  - Monitors the actions of Responsible Parties to meet their legal obligations.
  - Notifies Responsible Parties of claims it receives.

## Federal Government Efforts to Monitor and Oversee Responsible Parties' Claims Processing (cont.)

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- Deepwater IST (see figure 3)
  - Led by DHS's FEMA.
  - Was established on June 4, 2010, to coordinate efforts of federal departments and agencies to provide support services and monitor claims in response to the *Deepwater Horizon* oil spill.
- Since established, coordinated interagency and intergovernmental efforts to monitor the status of claims submitted to BP and the effectiveness and efficiency of BP's claims process. Took steps to raise awareness of concerns related to payment policy clarity for claimants, data access and reporting, and coordination of federal/state benefits and services to avoid duplicate payments.
  - According to the IST Transition Plan, is to stand down the majority of activities by September 30, 2010, with objectives and priorities either completed or transitioned to the appropriate workgroup or agency for longer-term follow-up.<sup>40</sup>
  - As of early September 2010, according to its status report, was expected to have met its general mission by late September.

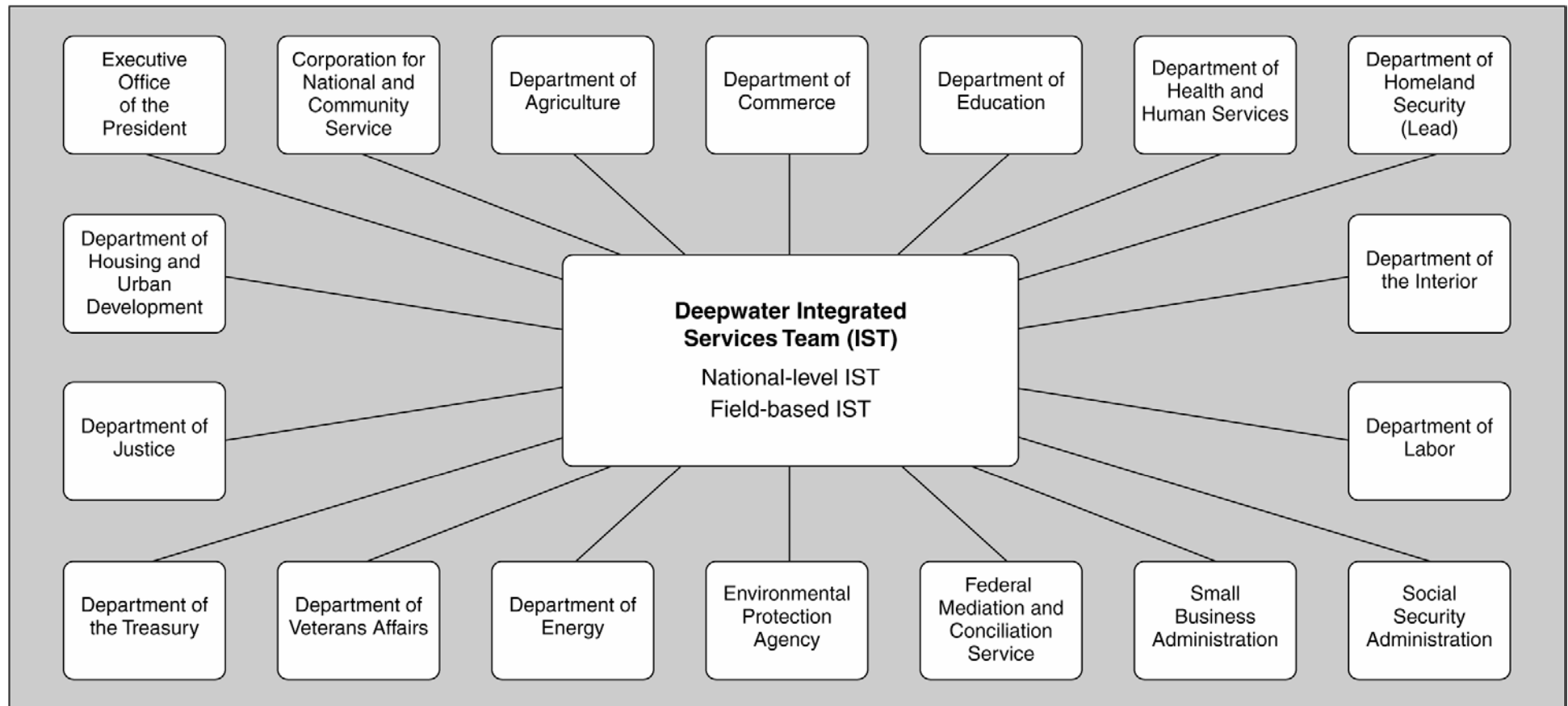
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<sup>40</sup>Our future work will look at the stand-down and transition to workgroup and agencies in order to understand the longer-term activities.



## Federal Government Efforts to Monitor and Oversee Responsible Parties' Claims Processing (cont.)

Figure 3: Participants in the Deepwater IST



Source: Deepwater IST.

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- Financial risks exist for the federal government as a result of the *Deepwater Horizon* oil spill. Total costs associated with the oil spill are unknown, but estimates are in the tens of billions of dollars. Further, BP has committed to paying costs of the *Deepwater Horizon* oil spill, even to the extent such costs exceed the \$20 billion it has agreed to set aside for such costs. However, circumstances may occur that adversely impact BP or other Responsible Parties' financial condition or ability to pay such claims. OPA places conditional limits on the liability of the Responsible Parties, but BP has stated that it will continue to pay costs above the limits applicable to the *Deepwater Horizon* oil spill. Any applicable limits have not been definitively determined through investigation or litigation. As such, it remains unclear whether the federal government will ultimately have to cover any *Deepwater Horizon* oil spill-related costs, and if so, the potential amounts that could be involved.
  - Consequently, in order to help minimize federal financial risks associated with the *Deepwater Horizon* oil spill, it will be imperative that the federal government take prompt action to ensure that its policies and procedures are up-to-date, clear, and sufficiently detailed. Further, going forward, sustained federal oversight and monitoring—including establishing mechanisms to ensure that established policies and procedures are fully and effectively implemented—and enacting legislation concerning the \$1 billion per incident cap will be essential.

## Matter for Congressional Consideration

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- Congress should consider amending OPA or enacting new legislation that eliminates the Fund's \$1 billion per incident expenditure cap to the extent that it does not take into account reimbursements from Responsible Parties. In this regard, Congress may want to consider setting a Fund cap associated with an incident based upon net expenditures (expenditures less reimbursements).

## Recommendations for Executive Action

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- In order to help establish and maintain effective cost reimbursement policies and procedures for the Fund, we recommend that the Secretary of Homeland Security direct the Director of the Coast Guard's NPFC to update NPFC's policies and procedures to include
  - current Fund reimbursement billing practices that reflect both a percentage of federal agencies' obligations as well as expenditures, and
  - specific procedural guidance on processing DOD requests for reimbursement using Military Interdepartmental Purchase Requests.
- In order to ensure that Responsible Parties are properly notified of their responsibilities for an oil spill, we recommend that the Secretary of Homeland Security direct the Director of NPFC to
  - update NPFC's current policies to reflect current organization and structure and management's directives, and
  - update NPFC's current procedures to provide detailed guidance and procedures for identifying and documenting Responsible Party notifications.

## Agency Comments and Our Evaluation

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- We provided a draft of our slides to DHS, the Department of Interior, and DOJ's management for comment. We received written comments from the Special Assistant, Office of the Chief Financial Officer, DHS. (See enclosure V.) We also received an email from DHS providing additional comments related to GAO's four recommendations. DHS's comments also included a number of technical suggestions concerning our findings which we considered and incorporated as appropriate in finalizing our product. DOJ also provided technical comments which we considered and incorporated as appropriate. The Department of the Interior did not provide any comments.
- In its written comments, DHS agreed with our matter for congressional consideration of revising the current \$1 billion per incident cap and cited a May 2010 request to increase the per incident cap to \$1.5 billion.
- With respect to our recommendations, DHS said that while its existing policies and procedures are sound to address many oil spills, the significance of the *Deepwater Horizon* spill highlights the need for adopting policy refinements. Accordingly, DHS agreed to update NPFC's current policies to reflect current organization and structure and stated it will further evaluate and analyze our recommendation to update NPFC's Fund reimbursement billing policies and procedures.

## Agency Comments and Our Evaluation (cont.)

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- DHS commented that no additional actions were needed with respect to two of our recommendations. We disagree.
  - For our recommendation to provide specific procedural guidance on processing DOD requests for reimbursements using MIPRs, DHS stated that existing legally binding bilateral agreements with documented procedures are already in place. However, NPFC's *User Reference Guide* does not address procedures for MIPRs.
  - With respect to our recommendation to provide detailed guidance and procedures for identifying and documenting all Responsible Party notifications, DHS viewed our recommendation as being directed toward using such formal notifications in determining Responsible Parties' liability. While we recognize that the purpose of the notice of designation is to help ensure Responsible Parties advertise the claims process as quickly as possible, we believe that failure to provide such prompt formal notifications may result in confusion, hindering Responsible Parties' compliance with cost recovery processes.

## Enclosure II: Scope and Methodology

To identify and analyze financial risks and exposures to the Oil Spill Liability Trust Fund (Fund) and federal government, we identified and analyzed applicable laws and regulations to identify statutory and regulatory limitations on the liability of Responsible Parties that may pose financial risks to the Fund and federal government to the extent that *Deepwater Horizon* oil spill claims exceed such limits. We also considered the risks and exposures identified in our previous work on the cost of oil spills in terms of their potential impact on the Fund.<sup>41</sup>

To provide a preliminary assessment of Coast Guard's National Pollution Funds Center's (NPFC) cost reimbursement process, we interviewed NPFC officials and performed walkthroughs of the cost reimbursement process with NPFC case officers to obtain an understanding of the process. We also observed NPFC's process for creating the fifth invoice that was sent to the Responsible Parties. Additionally, we performed a preliminary review of NPFC's policy and procedure manuals to determine the sufficiency of NPFC's documented policies and procedures. We also reviewed the Department of Homeland Security's (DHS) fiscal year 2009 agency financial report, including the independent auditor's report<sup>42</sup> and DHS Office of Inspector General's (OIG) *Information Technology Management Letter for the United States Coast Guard Component of the FY 2009 DHS Integrated Audit*<sup>43</sup> to determine the extent to which the independent public auditor and OIG identified weaknesses and deficiencies in the Coast Guard's cost reimbursement or payment processes. We also obtained the invoices that NPFC sent to the Responsible Parties. We checked the invoices for mathematical accuracy and reviewed and summarized the amounts by federal and state agencies; however, we did not test the amounts contained therein to determine their accuracy or eligibility under the Oil Pollution Act (OPA). During our future work, we plan on testing reimbursement invoices to determine their accuracy. We also obtained the Notices of Designation NPFC sent to Responsible Parties and interviewed NPFC officials about their methodology for identifying Responsible Parties and their procedures for notifying them.

To describe federal monitoring and oversight efforts of BP America Production Company (BP) and the Gulf Coast Claims Facility (GCCF) claims process, we interviewed Department of Justice (DOJ) officials about their oversight activities of BP claims process, the establishment of the Trust, and the setup of the GCCF. We also reviewed DOJ's comments on draft GCCF Emergency Advanced Payment protocols and obtained and reviewed the trust agreement. Additionally, we interviewed Deepwater Integrated Services Team (IST) officials about their oversight activities of BP and GCCF claims process and social services coordination efforts. We reviewed the Deepwater IST's documents including its coordination plan, team updates, and transition plan. We did not evaluate the effectiveness of the monitoring and oversight efforts by DOJ and the Deepwater IST. Additionally, we interviewed officials at the Department of the Interior to obtain an understanding of the agency's response to the *Deepwater Horizon* oil spill and its process for billing for costs incurred. Furthermore, we reviewed publicly available claims reports from BP and GCCF for claims amounts paid. We did not test the claims data or amounts reported by BP or GCCF.

We conducted this performance audit from July 2010 to October 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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<sup>41</sup>GAO, *Maritime Transportation: Major Oil Spills Occur Infrequently, but Risks to the Federal Oil Spill Fund Remain*, GAO-07-1085 (Washington, D.C.: Sept. 7, 2007).

<sup>42</sup>Department of Homeland Security, *Fiscal Year 2009 Annual Financial Report* (Washington, D.C., Nov. 16, 2009).

<sup>43</sup>Department of Homeland Security Office of Inspector General, *Information Technology Management Letter for the United States Coast Guard Component of the FY 2009 DHS Integrated Audit*, OIG-10-77 (Washington, D.C., Apr. 9, 2010).

## Enclosure III: Legal Framework

### Liability for Costs Associated with Oil Spills

A complex landscape of laws and regulations governs liability for coastal oil spill costs. The application of different laws and regulations affects which parties ultimately are subject to the various liabilities and financial risks.

In 1990, after the *Exxon Valdez* oil spill in the Prince William Sound in Alaska, Congress enacted the OPA which established a “polluter pays” system that generally places the primary liability for the cost of oil spills on the facility or vessel<sup>44</sup> owner or operator or other “responsible party,”<sup>45</sup> subject to certain limitations on the extent and amount of liability. Under this system, OPA allocates liability to the responsible party for certain spill costs, which include, up to specified limits where applicable, *removal costs* (cleaning up the spill) and *damage claims* (such as restoring the environment and payment of compensation to parties who were economically harmed by the spill) and which are sometimes referred to as “OPA-compensable costs.” To pay specified costs above a liability limit, as well as to pay costs when a responsible party does not pay or cannot be identified, OPA authorizes use of the Fund. The Fund is not available for certain types of injuries or damages that may arise in an oil spill incident, such as personal injuries or death or financial losses associated with oil company investments by members of the public. Such damages and injuries may be governed by other federal statutes, common law, or various state laws.

The federal government’s potential fiscal exposure increases as responsible parties’ capacity to cover their exposures is reduced, whether as a result of extensive oil spill liabilities, poor financial condition of responsible parties, or other factors. OPA and other federal laws<sup>46</sup> set out the federal process for oil spill response management, the liability of different parties in the event of an oil spill incident, and federal funding to cover certain oil spill costs that are not covered by private parties engaged in maritime activities.<sup>47</sup>

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<sup>44</sup>OPA contains provisions dealing with facilities, including offshore facilities, onshore facilities, pipelines, and deepwater ports, as well as vessels, including mobile offshore drilling units, tank vessels, barges, and cargo, fishing, and other ships. For definitions of these terms, see 33 U.S.C. § 2701.

<sup>45</sup>For example, for an offshore facility, the responsible party is the permittee or lessee of the area in which the facility is located.

<sup>46</sup>For example, a parallel and similar framework exists for costs associated with the release of hazardous substances, which can occur in connection with an oil spill. The Comprehensive Environmental Response and Compensation Act of 1980, as amended (CERCLA), 42 U.S.C. ch. 103, contains liability, discharge response management, and funding provisions similar to and generally integrated with those described in this enclosure for oil spills.

<sup>47</sup>Federal laws and regulations also provide for advance oil spill prevention and response planning. This is generally reflected in the *National Oil and Hazardous Substances Pollution Contingency Plan* (known as the *National Contingency Plan*), 40 C.F.R. pt. 300, the *National Response Framework*, available at <http://www.fema.gov/emergency/nrf>, and the *Integrated Contingency Plan*, 61 Fed. Reg. 28642 (June 5, 1996).



### Enclosure III: Legal Framework

The *National Contingency Plan* (NCP), 40 C.F.R. part 300, generally sets out the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants. This enclosure provides a summary of this framework as applied to oil spills in coastal waters.<sup>48</sup>

#### *Oil Spill Response Management Process*

The federal framework includes a coordinated response process involving private parties and all levels of government. In the event of the discharge of oil (or hazardous substances) in coastal waters, any person in charge of a vessel or facility must give notice to the National Response Center,<sup>49</sup> which is administered by the Coast Guard as part of the NCP.<sup>50</sup> Responses to large oil spills are typically a cooperative effort between the public and private sector, and there are numerous players who participate in responding to and paying for oil spills. To manage the response effort, the responsible party, the Coast Guard, EPA, and the pertinent state and local agencies form the unified command, also known as the National Response System, which implements and manages the spill response.<sup>51</sup> Responses can include activities undertaken by federal agencies, states, tribal and local governments, responsible parties (*i.e.*, owners and operators of vessels or facilities) and their guarantors (*i.e.*, insurers), and nongovernmental participants, including qualified individuals<sup>52</sup> and Oil Spill Response Organizations, which usually serve as contractors to the federal government or responsible parties to support response activities, such as skimming or disposing of oil.

The lead federal authority, or Federal On-Scene Coordinator (FOSC), in conducting a spill response is usually the nearest Coast Guard Sector and is headed by the Coast Guard Captain of the Port.<sup>53</sup> Under the NCP, when the Coast Guard designates an oil spill as a spill of national significance, the Coast Guard may appoint a National Incident

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<sup>48</sup>Other laws may also apply and different risks may also arise in oil spills that occur in inland waters, including state and private water, and on land. Although the areas of federal and state government jurisdiction over inland and ocean waters varies by federal and state law, in this enclosure, in general, federal waters include all coastal waters extending seaward 200 nautical miles and all inland navigable waters (*i.e.*, waters over which the federal government has jurisdiction to regulate), and state waters include all waters within or adjoining a state and up to 3 nautical miles from the coastline, although certain states and territories own and can regulate waters up to 9 nautical miles from the coastline. For a description of the nature of federal and state jurisdiction over ocean waters and ownership of the related submerged lands, see *An Ocean Blueprint for the 21<sup>st</sup> Century*, U.S. Commission on Ocean Policy (Wash., D.C.: Sep. 20, 2004), available at <http://oceancommission.gov/> (last visited Nov. 2, 2010).

<sup>49</sup>33 C.F.R. § 153.203; 40 C.F.R. §§ 110.6, 300.125, and 302.6. The primary function of the National Response Center is to serve as the sole national point of contact for reporting all oil, chemical, radiological, biological, and other discharges into the environment anywhere in the United States and its territories.

<sup>50</sup>The NCP establishes the top priority of an oil spill response as saving human life and the next priority as stabilizing the situation to preclude it from worsening, including the prevention of further spilling that would require additional removal actions and to minimize adverse impact to the environment. 40 C.F.R. § 300.317.

<sup>51</sup>The Incident Command System (ICS) is a standardized response management system that is part of the National Interagency Incident Management System. The ICS is organizationally flexible so that it can expand and contract to accommodate spill responses of various sizes. The ICS typically consists of four sections: operations, planning, logistics, and finance/administration.

<sup>52</sup>As part of vessel oil spill response plans, vessels must designate a “qualified individual” who acts with full authority to obligate private funds required to carry out response activities. The qualified individual acts as a liaison with the lead federal authority and is responsible for activating the incident response plan.

<sup>53</sup>For coastal oil spills, the Coast Guard generally serves as the FOSC and for inland oil spills the Environmental Protection Agency generally serves as the FOSC.

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Commander to provide strategic-level coordination among all public and private international and domestic parties.<sup>54</sup> When notice of an oil spill is received by the Coast Guard, and as soon as the source is identified, NPFC must notify the responsible party or parties by telephone, telefax, or other means of NPFC's designation.<sup>55</sup>

According to NPFC guidance, "the [responsible party] has primary responsibility for response to a spill incident, including setting up the [Incident Command System] and joining with the FOSC and state on-scene coordinator (SOSC) in the [unified command]."<sup>56</sup> However, as reflected in the NCP, NPFC guidance explains that, "even when the responsible party leads a reasonable response effort, the FOSC is always in ultimate command and may decide to direct specific action or, for whatever reason it is deemed necessary, actually take the lead role in the response." Under the Clean Water Act and the Comprehensive Environmental Liability and Compensation Act (CERCLA), and as set out in the NCP, the FOSC may issue administrative orders to protect the public health or welfare to responsible parties and other private parties directing them to take action to assist in a response.<sup>57</sup>

The FOSC directs response efforts at the scene of an oil spill.<sup>58</sup> Additionally, to obtain assistance from other government agencies, the FOSC issues pollution removal funding authorizations—commitments that the agency will receive reimbursement from the Fund for performing response activities—to obtain services and assistance from other government agencies. Other federal agencies may also be involved. For example, NOAA provides scientific support, monitors and predicts the movement of oil, and conducts environmental analyses of the affected area. The federal, state, and tribal trustees perform one or more natural resource damage assessments, as appropriate. Additionally, regional governmental entities that are affected by the spill—both state and local—as well as tribal government officials or representatives may participate in the unified command and contribute to the response effort, and they may be entitled to reimbursement from the responsible party or the Fund.

### *Oil Spill Liability and Federal Funding*

A complex landscape of laws and regulations governs the liability of various parties for coastal oil spill costs. The applicability of different laws and regulations affects which parties ultimately are subject to the various liabilities and financial risks.

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<sup>54</sup>40 C.F.R. § 300.323(c). Coast Guard Admiral Thad Allen was designated as the National Incident Commander for the *Deepwater Horizon* incident.

<sup>55</sup>33 U.S.C. § 2714(a); 33 C.F.R. § 136.305(a). A written notice of designation confirms any designation.

<sup>56</sup>NPFC, *NPFC User Reference Guide (eURG)*, Appendix B, *FOSC Funding Information for Oil Spills and Hazardous Materials Releases* (Wash., D.C.: April 2003), available at <http://uscg.mil/npfc/URG/default.asp> (accessed Nov. 4, 2010).

<sup>57</sup>See 40 C.F.R. § 300.130 for applicable procedures and requirements.

<sup>58</sup>On May 22, 2010, the President established a National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling to examine the root causes of the *Deepwater Horizon* incident and options for guarding against, and mitigating the impact of, oil spills associated with offshore drilling. The Commission is evaluating the effectiveness of the NCP response in the *Deepwater Horizon* incident. See <http://www.oilspillcommission.gov>.

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### Overview of Liability for Oil Spills

OPA, which among other things amended the CWA, identifies the types of parties liable for costs and damages it covers, known as “responsible parties.” OPA requires that, subject to certain exceptions, all nonfederal claims for OPA-compensable removal costs or damages be submitted first to the responsible party or the responsible party’s guarantor.<sup>59</sup> As discussed further below, federal agencies are authorized to use the Fund to cover their removal costs, and the federal government is entitled to reimbursement from responsible parties. Under OPA, responsible parties for vessels,<sup>60</sup> are the owners, operators, or charterers.<sup>61</sup> Responsible parties for offshore facilities are those parties that hold leases or permits for lands on the outer continental shelf.<sup>62</sup> Independent third parties can be liable under OPA if they are the sole cause of the oil spill, and others who insure responsible parties (guarantors) are also liable jointly with the responsible parties (up to the amount of their guarantee).<sup>63</sup>

OPA addresses the discharge of oil from a facility or vessel as those terms are defined in the act.<sup>64</sup> Responses and liability for hazardous substances not covered by OPA, which can occur in connection with an oil spill, are addressed under CERCLA.<sup>65</sup> Also, OPA does not apply to oil spills from a public vessel, which OPA defines as “a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce.”<sup>66</sup>

Congress expressly reserved for each state the authority for it to impose additional liability or requirements related to oil spills that occur within the state, including the state’s coastal waters.<sup>67</sup> Finally, state oil pollution laws as well as other federal and state laws establish liability for a number of damages, injuries, costs, and fines and penalties not covered by OPA. For example, liability for physical and emotional harms resulting from an oil spill is established under federal maritime and state tort laws depending on various factors, such as where the incident or harm occurs.

Table 2 lists a variety of damages, injuries, cleanup costs, and fines and penalties that can be incurred in relation to an oil spill incident in coastal waters and identifies the parties that generally are entitled to recover financially from responsible parties, assuming that relevant legal criteria have been met. Depending on the circumstances surrounding any particular oil spill incident, a party may incur liability for any combination of these damages, injuries, cleanup costs, and fines and penalties.

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<sup>59</sup>33 U.S.C. § 2713(a).

<sup>60</sup>A mobile offshore drilling unit such as *Deepwater Horizon* is a vessel capable of use as an offshore facility.

<sup>61</sup>33 U.S.C. § 2701(32)(A).

<sup>62</sup>33 U.S.C. § 2701(32)(C).

<sup>63</sup>33 U.S.C. §§ 2702(d), 2716.

<sup>64</sup>Oil spills governed by OPA are discharges of oil into coastal federal and state waters (in addition to inland navigable waters, which are not addressed in this enclosure). A “discharge” of oil covered by OPA includes “any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping.” 33 U.S.C. § 2701(7).

<sup>65</sup>See section 101(14) of CERCLA, 42 U.S.C. § 9601.

<sup>66</sup>33 U.S.C. § 2701(29).

<sup>67</sup>33 U.S.C. § 2718(a) and (b).

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**Table 2: Possible Liability for an Oil Spill in Coastal Waters**

Type of harm or penalty	Selected parties who may be entitled to recover	Applicable laws
<b>Removal costs (or cleanup costs)</b>		
<ul style="list-style-type: none"> <li>Removal of oil or hazardous substances</li> </ul>	Federal government; <sup>a</sup> states; Indian tribes; and any person taking action consistent with the National Contingency Plan	OPA, CERCLA, and state laws
<ul style="list-style-type: none"> <li>Disposal</li> </ul>	Federal government; states; Indian tribes; and any person taking action consistent with the National Contingency Plan	OPA, CERCLA, and state laws
<ul style="list-style-type: none"> <li>Personnel</li> </ul>	Federal government; states	OPA, CERCLA, and state laws
<ul style="list-style-type: none"> <li>Prevention of further spills</li> </ul>	Federal government; states; Indian tribes; and any person taking action consistent with the National Contingency Plan	OPA, CERCLA, and state laws
<b>Damages</b>		
<ul style="list-style-type: none"> <li>Natural resource damages</li> </ul>	Federal, state, and foreign governments and Indian tribes	OPA, CERCLA, and state laws
<ul style="list-style-type: none"> <li>Real or personal property damage</li> </ul>	Federal, state, local and foreign governments, Indian tribes, and private organizations and individuals	OPA and state laws
<ul style="list-style-type: none"> <li>Subsistence use damages</li> </ul>	Indian tribes, private organizations, individuals	OPA and state laws
<ul style="list-style-type: none"> <li>Loss of earning capacity</li> </ul>	Companies or individuals with loss of profits or income (One does not have to own the damaged property or resources to submit a claim under this category.)	OPA and state laws
<ul style="list-style-type: none"> <li>Loss of government revenues or profits</li> </ul>	Federal agencies; states; local governments	OPA and state laws
<ul style="list-style-type: none"> <li>Increased public service costs</li> </ul>	States and local governments	OPA and state laws
<ul style="list-style-type: none"> <li>Lost investments due to false or misleading statements about oil-related activities leading to share inflation by companies</li> </ul>	Shareholders	Federal securities laws
<b>Injuries to the person (including death)</b>		
<ul style="list-style-type: none"> <li>Physical injuries to or death of workers in the production, transportation, or storage of oil</li> </ul>	Depending upon applicable laws, the injured seaman, or personal representatives of the deceased in case of death; family members of the deceased; the injured maritime worker or family members of deceased.	Jones Act, Death on the High Seas Act (DOHSA), Longshore and Harbor Workers Compensation Act (LHWCA), Outer Continental Shelf Lands Act (OCSLA). <sup>b</sup>
<ul style="list-style-type: none"> <li>Physical harm to or death of bystanders, including members of the public</li> <li>Emotional distress</li> </ul>	Individuals suffering the injury	Admiralty and maritime tort law; state tort laws

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Type of harm or penalty	Selected parties who may be entitled to recover	Applicable laws
<ul style="list-style-type: none"> <li>Pain and suffering</li> </ul> <i>Criminal and Civil Fines and Penalties</i>		
<ul style="list-style-type: none"> <li>Civil Damages or Civil Judicial Penalties</li> </ul>	Federal and state governments	Clean Water Act (CWA), OCSLA and state laws
<ul style="list-style-type: none"> <li>Criminal Fines and Penalties<sup>c</sup></li> </ul>	Federal and state governments	CWA, Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), Migratory Bird Treaty Act (MBTA), OCSLA, Occupational Safety, Health Act (OSHA), Refuse Act, and state laws
<ul style="list-style-type: none"> <li>Civil Administrative Fines and Penalties</li> </ul>	Federal and state governments	CWA, ESA, MMPA, OPA, OSHA, and state laws

Source: GAO.

<sup>a</sup>.At least one U.S. district court has held that the federal government's right to recover cleanup costs is not unlimited under OPA. *United States v. John Paul Jones, Jr.*, 267 F. Supp. 2d 1349, 1363-64 (M.D. Ga. 2003). The court ruled that the federal government may take steps to recover its cleanup costs except to the extent that the responding party establishes that those costs were incurred in an arbitrary and capricious manner. The court explained that federal courts have the authority to review and set aside any government "action" in cleaning up the oil spill under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard in the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

<sup>b</sup>.Applicable provisions of federal laws include: Jones Act, 46 U.S.C. § 30104; Death on the High Seas Act (DOHSA), 46 U.S.C. App. § 761; Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 901; Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356a, as amended.

<sup>c</sup>.Miscellaneous Provisions of Title 18 of the U.S. Code (federal penal code) are often used in the prosecution of federal environmental crimes, such as Aiding and Abetting, 18 U.S.C. § 2; Conspiracy, 18 U.S.C. § 371; False Statements, 18 U.S.C. § 1001; Mail Fraud, 18 U.S.C. § 1341; Wire Fraud, 18 U.S.C. § 1343; Obstruction of Justice, 18 U.S.C. § 1512; the Criminal Fine Improvements Act, 18 U.S.C. § 3571.

OPA requires that, subject to certain exceptions, all claims by individuals, businesses, states, and local and tribal governments for OPA-compensable removal costs or damages be submitted first to the responsible party or the responsible party's guarantor. Unless NPFC's designation of a responsible party for an oil spill is denied, or if the source of the oil spill is either a public vessel, or unidentifiable, NPFC will instruct the responsible party on the means of advertising the claims procedure to the public and other interested parties.<sup>68</sup> If the responsible party denies a claim or does not settle it within 90 days, a claimant may commence action in court against the responsible party, or present the claim to the NPFC. Again, this process applies only to the costs and damages for which liability arises under OPA.

Under OPA, certain parties must demonstrate financial responsibility before engaging in activities that may result in financial liability under the act. OPA requires the responsible parties for vessels and off-shore facilities to demonstrate the financial resources to respond to an oil spill up to the statutory limit of liability. Under various implementing regulations, the processes and applicable oversight by federal and state agencies for demonstrating financial responsibility vary according to the different facilities or vessels

<sup>68</sup> 33 U.S.C. § 2714; 33 C.F.R. §§ 136.309, 136.311, and 136.313.

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being used.

For example, before any vessel or mobile offshore drilling unit larger than 300 gross tons operates in United States waters or any vessel that transships or transfers oil in the Exclusive Economic Zone, the responsible parties for oil spills under OPA must first obtain a Certificate of Financial Responsibility (CoFR) from NPFC.<sup>69</sup> To receive a CoFR, the responsible party must demonstrate adequate financial resources to cover the maximum potential liability for an oil spill from a vessel, up to the limits under OPA. Responsible parties may self-insure their financial responsibility requirements or they may purchase insurance from a guarantor, which NPFC must also certify as being contractually obligated to cover the responsible party's maximum potential OPA liability. Failure to comply with the CoFR requirements can result in denial of authority to operate in United States waters.<sup>70</sup>

Users of offshore facilities on outer continental shelf lands have similar requirements to those covering vessels. Under OPA, they must submit evidence of Oil Spill Financial Responsibility (OSFR) for an offshore facility (that generally is capable of discharging more than 1,000 barrels of oil) to the Department of the Interior (Interior) and receive its approval.<sup>71</sup> In implementing these requirements, Interior's Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) requires potential operators of offshore facilities to obtain approval of their OSFR as a condition of engaging in oil exploration, drilling, or production.<sup>72</sup> Under OPA, the holder of the permit for use of the outer continental shelf lands is a responsible party for liabilities related to oil spills from an offshore facility,<sup>73</sup> but if the operator of the offshore facility is not the permit holder, BOEMRE requires the operator to contractually agree to joint liability. As with vessels, offshore facility operators or permit holders may self-insure their financial responsibility requirements or they may purchase insurance from a guarantor.

These OPA requirements for demonstrating financial responsibility apply only to the statutory maximum amount of potential liability under OPA.<sup>74</sup> It should be noted that OPA

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<sup>69</sup>The Coast Guard regulations for CoFR process are set out at 33 C.F.R. part 138.

<sup>70</sup>33 U.S.C. § 2716(b). A state may enforce these financial responsibility requirements. 33 U.S.C. § 2719.

<sup>71</sup>Interior regulations for the OSFR process are set out in 30 C.F.R. part 253. Interior's Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE), formerly the Minerals Management Service (MMS), administers this process in conjunction with its authority to lease outercontinental shelf lands and oversee oil exploration and production. *See, generally*, 43 U.S.C. §§ 1331-1356a and 30 C.F.R. parts 250 and 260. GAO and the Department of the Interior Office of Inspector General have issued several reports identifying problems in MMS's oil and gas program leasing and revenue collection programs. *See* GAO-10-888T, *Oil and Gas Management: Past Work Offers Insights to Consider in Restructuring Interior's Oversight* (Wash., D.C.: July 22, 2010) for a discussion of this work.

<sup>72</sup>30 C.F.R. § 253.11. The procedures for obtaining permits to operate a deepwater port, a specialized facility under OPA, are established by the Department of Transportation under the Deepwater Port Act of 1974, as amended, 33 U.S.C. § 1501, *et seq.*, in 33 C.F.R. part 148. Guidance on this process, including demonstrations of financial responsibility under OPA, is available on the websites of the Maritime Administration and the United States Coast Guard, [http://www.marad.dot.gov/ports\\_landing\\_page/deepwater\\_port\\_licensing/deepwater\\_port\\_licensing.htm](http://www.marad.dot.gov/ports_landing_page/deepwater_port_licensing/deepwater_port_licensing.htm) and <http://www.uscg.mil/hq/cg5/cg522/cg5225>, respectively. The President delegated the authority to issue regulations governing the demonstration of financial responsibility to Interior for offshore facilities and Transportation for deepwater ports in Executive Order No. 12777, Oct. 22, 1991, as amended by Executive Order No. 13286, Feb. 28, 2003.

<sup>73</sup>33 U.S.C. § 2701(32)(C).

<sup>74</sup>As noted above, states may impose additional liability and requirements related to oil spills in state waters.

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places limits on the amount of liability of responsible parties, unless the oil discharge is the result of gross negligence or willful misconduct, or a violation of federal operation, safety, and construction regulations, in which case liability is unlimited.<sup>75</sup> A limitation of liability also is not available where the responsible party fails or refuses to: report the incident as required by law, provide all reasonable cooperation and assistance requested by a responsible official regarding removal activities or without sufficient cause, to comply with an order issued under subsection (c) or (e) of 33 U.S.C. § 1321 of 33 U.S.C. § 1471.

In general, liability limits under the OPA depend on the kind of vessel or facility from which a spill originates.<sup>76</sup> For an offshore facility like the Macondo Prospect well, statutory liability is limited to all removal costs plus \$75 million for damages. For tank vessels, liability limits are based on the vessel's tonnage and hull type, although a statutory division of liability for mobile offshore drilling units results in a range of possible liability limits. For spills on or above the surface of the water, mobile offshore drilling units are treated first as tank vessels up to the limit of liability for tank vessels and then as offshore facilities. The current liability limits under OPA are set out in Table 3.

**Table 3: Description of Vessels and Offshore Facilities and Current Limits of Liability**

Vessels or Facilities	Description	Limit of liability
Oil tanker	An oil tanker is a ship designed to carry oil in large tanks.	Single hull: Vessels greater than 3,000 gross tons: the greater of \$3,200 per gross ton or \$23,496,000.  Vessels less than or equal to 3,000 gross tons: the greater of \$3,200 per gross ton or \$6,408,000.  Double hull: Vessels greater than 3,000 gross tons: the greater of \$2,000 per gross ton or \$17,088,000.
Tank barge	A tank barge is a non-self-propelled vessel that carries liquid, solid, or gaseous cargos in bulk in tanks primarily through rivers and inland waterways.	Vessels less than or equal to 3,000 gross tons: the greater of \$2,000 per gross on or \$4,272,000.
Cargo ship or freighter	A cargo ship or freighter is a vessel that transports non-oil goods and materials.	The greater of \$1,000 per gross ton or \$854,400.
Fishing vessel	A fishing vessel is a ship that is used to catch fish for commercial use.	

<sup>75</sup> Under OPA, a responsible party can also assert a defense to liability if the oil spill was caused solely by, among other things, an "act of God," an "act of war," the acts or omissions of an independent third party (provided certain conditions are satisfied), or any combination of these. 33 U.S.C. § 2703. NPFC guidance acknowledges that terrorism or other criminal acts may present a defense to liability under OPA. NPFC, *NPFC User Reference Guide (eURG)*, Appendix B, *FOSC Funding Information for Oil Spills and Hazardous Materials Releases* (Wash., D.C.: April 2003), available at <http://uscg.mil/npfc/URG/default.asp>.

<sup>76</sup> 33 U.S.C. § 2704.

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Vessels or Facilities	Description	Limit of liability
Offshore facility	An offshore facility is any facility of any kind located in, on, or under any of the navigable waters of the U.S., and any facility of any kind that is subject to the jurisdiction of the U.S. and is located in, on, or under any other waters, other than a vessel or a public vessel.	All cleanup costs plus \$75 million.
Mobile offshore drilling unit (MODU)	A MODU is a vessel (other than a self-elevating lift vessel) capable of use as an offshore facility.	For a discharge on or above the surface of the water, a MODU is first treated as a tank vessel up to the limit of liability for tank vessels. For costs above the vessel liability limit, the MODU is treated as an offshore facility.

Source: GAO.

OPA requires the Coast Guard to adjust the limits of liability not less often than every 3 years to reflect significant increases in the Consumer Price Index, but as GAO recently pointed out, further attention is needed to adjust the liability limits. *See* GAO-10-795T and GAO-07-1085.

### Oil Spill Liability Trust Fund

Congress created the Fund<sup>77</sup> to finance the removal costs and damages covered by OPA and the CWA to the extent that responsible parties invoke defenses to or limits on their liability, are unable or unwilling to pay, or cannot be identified.<sup>78</sup> OPA provides that the Fund is available to pay for OPA-compensable removal costs and damages, including federal agencies' costs.<sup>79</sup> Accordingly, OPA requires the President to issue regulations governing how federal officials incur obligations for OPA-compensable costs.<sup>80</sup> In general, the President charged the Coast Guard with administering the Fund, but also authorized federal agencies that incur oil spill response costs and related costs to establish their own policies and procedures for doing so.<sup>81</sup> Further, a state may obligate up to \$250,000 from the Fund for the costs of immediate removal of oil or the mitigation or prevention of a discharge, pursuant to a request approved by or a written agreement entered into with the federal government.<sup>82</sup>

Under NPFC policy, the FOSC controls the use of the Fund for removal costs. First, the FOSC coordinates with federal agencies involved in a response to charge certain costs

<sup>77</sup>Congress created the Fund in 1986, but not until the *Exxon Valdez* grounding and the passage of OPA in 1990, did it authorize use of the Fund.

<sup>78</sup>If the responsible party denies the NPFC designation or cannot pay or if NPFC cannot identify the source or if the source is a public vessel, OPA requires NPFC to advertise the claims process. 33 U.S.C. § 2714(c).

<sup>79</sup>33 U.S.C. § 2712 and 26 U.S.C. § 9509(e)(1). OPA consolidated the liability and compensation provisions of four prior federal oil pollution initiatives and their respective trust funds into the Oil Spill Liability Trust Fund and authorized the collection of revenue and the use of the money, with certain limitations, with regard to expenditures. The prior federal laws regarding oil pollution were the Federal Water Pollution Control Act, the Deepwater Port Act, the Trans-Alaska Pipeline System Authorization Act, and the Outer Continental Shelf Lands Act Amendments of 1978.

<sup>80</sup>33 U.S.C. §§ 2712(c), (e).

<sup>81</sup>Executive Order No. 12777, as amended by Executive Order 13286.

<sup>82</sup>33 U.S.C. § 2712(d).



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directly against the Fund. Second, the FOOSC authorizes federal agencies to incur response costs chargeable to the Fund under a Pollution Removal Funding Authorization (PRFA) or Military Interdepartmental Purchase Request (MIPR). Federal agencies coordinate with NPFC to document these removal costs. NPFC issues guidance to federal agencies on appropriate accounting and related procedures to support these costs.<sup>83</sup>

Under OPA, and pursuant to the Energy Policy Act of 2005 and the Energy Improvement and Extension Act of 2008, the Fund's revenue is generated by a per barrel tax of eight cents on petroleum products received at a United States refinery or imported from other countries. The barrel tax is set to expire in 2017 (after an increase to nine cents per barrel for that year). The fund also receives reimbursements from responsible parties for response costs and damage claims paid by the Fund. For example, as of October 19, 2010, BP had reimbursed the Fund for \$518.4 million for *Deepwater Horizon* cleanup costs incurred by Federal agencies. Other funds that flow into the Fund are recoveries of penalties paid pursuant to various statutes, including the Clean Water Act and Deepwater Port Act; and interest earned on U.S. Treasury investments.<sup>84</sup>

OPA authorizes the use of the Fund for, among other specified purposes:<sup>85</sup>

- Removal costs and related monitoring activities that are consistent with the NCP;
- Natural resource damages include the costs to assess the natural resources, and the costs to restore, rehabilitate, replace or acquire equivalent natural resources;
- Payment of claims submitted by private claimants, and states, local, and Indian government claimants; and
- Payment of federal administrative, operational, and personnel costs and other expenses to implement OPA and the Clean Water Act, provided:
  - Not more than \$25 million shall be available per fiscal year for "the operating expenses incurred by the Coast Guard;"<sup>86</sup> and
  - Not more than \$27.25 million per year shall be available for oil pollution research.<sup>87</sup>

Expenditures may be made out of the Fund only pursuant to appropriations acts, except for the following:<sup>88</sup>

- Reimbursements for natural resource damages (33 U.S.C. § 2706(f));
- Payment of claims to claimants (33 U.S.C. § 2712(a)(4));
- Expenses related to the Oil Spill Recovery Institute (33 U.S.C. §§ 2731-2736);
- Natural resource damage assessments (33 U.S.C. § 2706);
- Payment of up to \$50 million per fiscal year for immediate oil spill removal costs under the Clean Water Act (33 U.S.C. §§ 1321(c), 2752(b)); and

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<sup>83</sup>On July 1, 2010, the Office of Management and Budget issued guidance to federal agencies outlining "sound practices" for tracking all costs incurred in responding to the *Deepwater Horizon* incident, including their direct costs and indirect costs, but specifically stated that it did not supersede NPFC's guidance on identifying and documenting reimbursable removal costs. OMB Memorandum No. M-10-29, *Identifying and Documenting Costs of Government Activities Related to the BP Deepwater Horizon Oil Spill*, July 1, 2010.

<sup>84</sup>26 U.S.C. § 9509(b). The fund may also borrow up to \$1 billion from the general fund of the U.S. Treasury, as may be provided in appropriations acts. 26 U.S.C. § 9509(d).

<sup>85</sup>26 U.S.C. § 9509(c); 33 U.S.C. § 2712(a).

<sup>86</sup>33 U.S.C. § 2712(a)(5)(A).

<sup>87</sup>33 U.S.C. § 2712(a)(5)(C).

<sup>88</sup>26 U.S.C. § 9509(c); 33 U.S.C. § 2752(a). See B-255979, Oct. 30, 1995.

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- Emergency advances for any oil spill, up to \$100 million, or specifically for the *Deepwater Horizon* incident an unlimited amount (in increments of up to \$100 million), subject to overall limitations on the use of the Fund (see below).<sup>89</sup>

The Fund is divided administratively into a Principal Fund and an Emergency Fund. The Emergency Fund accounts for all amounts designated for immediate oil spill removal costs (up to \$50 million) and all emergency advances (increments up to \$100 million) for an oil spill incident. All other amounts are accounted for in the Principal Fund. See Figure 4 for a depiction of the Fund's structure.

OPA established limits on federal expenditures from the Fund, currently set at the lesser of either:

- The balance of the Principal Fund, including reimbursements from responsible parties and up to \$1 billion that may be borrowed from the general fund of the U.S. Treasury pursuant to an appropriation act (less a required \$30 million minimum balance in the fund), or
- \$1 billion in total expenditures per incident and \$500 million for natural resource damage assessments and claims per incident.<sup>90</sup>

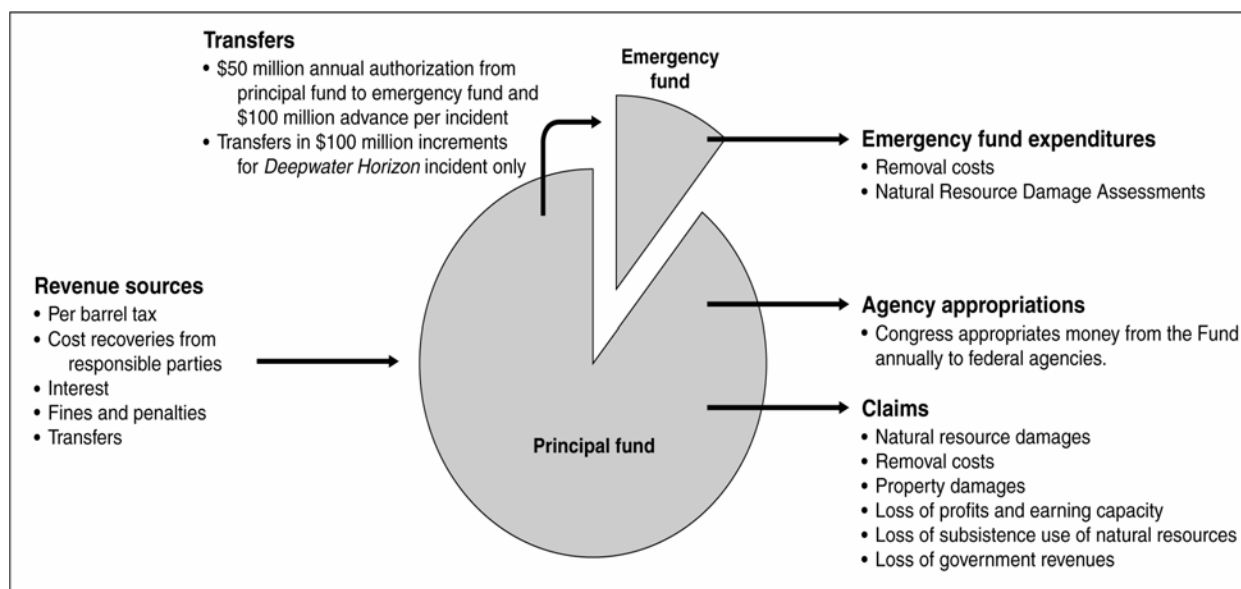
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<sup>89</sup>Congress provided these authorities in the Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 323, 116 Stat. 2064, 2104 (2002) and in June and July 2010, in Public Laws 111-191, (Pub. L. No. 111-191, § 1, 124 Stat. 1278 (2010) and 111-212, (Pub. L. No. 111-212, § 2001, 124 Stat. 2302, 2337 (2010), respectively. The Coast Guard must notify Congress of each emergency advance.

<sup>90</sup>26 U.S.C. § 9509(c)(2). The Department of Homeland Security General Counsel told us that individual federal agencies may receive and use separate appropriations for their response costs and that such costs count toward the Fund's statutory expenditure limits only if and when the Fund reimburses an agency's appropriation. The NCP provides that agencies incurring costs other than oil spill response costs may use their appropriations to the extent that they are available for the specific agency action, such as scientific investigations related to an oil spill. 40 C.F.R. § 300.335(d). Further, the NCP states that the Department of Defense uses certain of its appropriations for specific response activities, such as removal of sunken vessels or other obstructions of navigation. 40 C.F.R. § 300.335(f)(1)(i).

## Enclosure III: Legal Framework

**Figure 4: Oil Spill Liability Trust Fund**



Sources: NPFC and DHS Coast Guard report on implementation of the Oil Pollution Act of 1990.

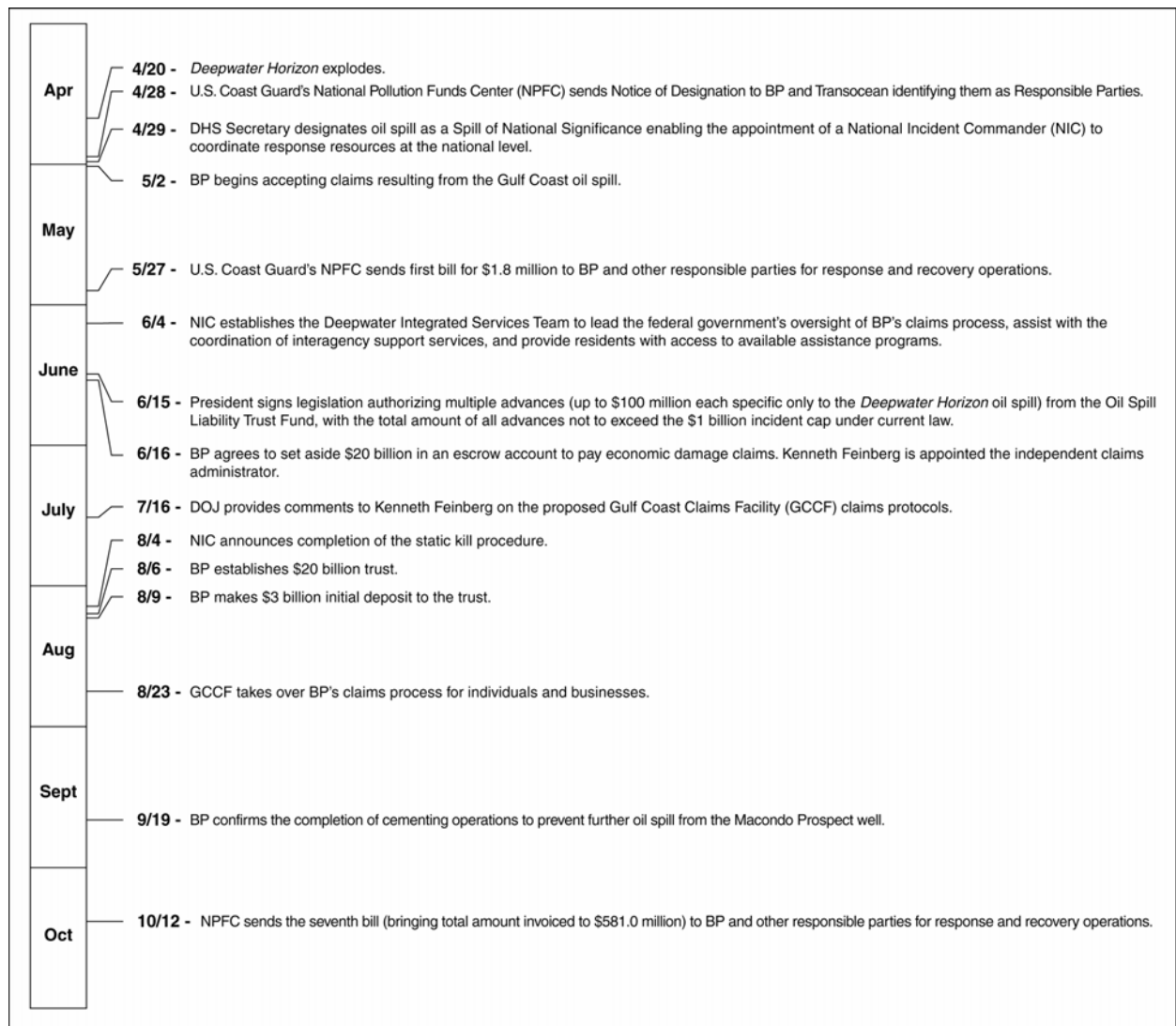
Finally, the Fund cannot be used to pay for costs, damages, or injuries that are not covered by OPA and the Clean Water Act.<sup>91</sup> Certain response costs for discharges of hazardous substances that are covered by CERCLA are funded out of the Superfund.<sup>92</sup> Likewise, certain response costs may be funded out of the Disaster Relief Fund if the President makes a disaster declaration. (Such a declaration was not made in response to the *Deepwater Horizon* incident.)

<sup>91</sup>See NPFC, *NPFC User Reference Guide (eURG)*, Appendix B, *FOSC Funding Information for Oil Spills and Hazardous Materials Releases* (Wash., D.C.: April 2003), available at <http://uscg.mil/npfc/URG/default.asp>.

<sup>92</sup>See 26 U.S.C. § 9507; 42 U.S.C. § 9611.

## Enclosure IV: Deepwater Horizon Oil Spill

**Figure 5: Timeline of *Deepwater Horizon* Oil Spill Events**



Source: GAO analysis of key events for the *Deepwater Horizon* Oil Spill.

## Enclosure V: Comments from the Department of Homeland Security

### USCG Comments on GAO Deepwater Horizon Oil Spill Preliminary Assessment dated November 8, 2010

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#### General Comments

The Coast Guard's authorities and policies in response to the many oil spills that occur in the United States on a day-to-day basis are fundamentally sound and effective. Deepwater Horizon (DWH), the first ever Spill of National Significance (SONS), is highlighting certain authority and policy refinements the National Pollution Fund Center should consider adopting for use in a SONS or other extraordinary events. The Oil Spill Liability Trust Fund is available only to the extent that costs are allowed by the Oil Pollution Act. Not all costs resulting from the Deepwater Horizon oil spill are OPA related costs.

#### Billing Process

Since 1991, Standard Operating Procedure to fund the interagency cost to an OPA event involves access to the OSLTF using interagency agreements (PRFA and MIPR) that result in obligations. Agency participation culminates in submission of all cost documentation supporting agency expenditures and a request for reimbursement. NPFC reimbursement becomes the actual expenditure and basis of any cost recovery against the RP. NPFC's standard billing process requires completion of response activities and a full reconciliation of all related costs.

Due to the unprecedented nature of the Deepwater Horizon response, the NPFC, the federal agencies involved in the DWH response, and BP collectively agreed to a billing procedure in which the NPFC would provide BP a bill consolidating major Federal and state government response obligations on a periodic basis. The consolidated periodic bill requested BP remit 75% of the major Federal and state obligations listed. In return, BP agreed to remit the 75% of the obligated amount immediately to allow the government agencies to continue their part of the response efforts. The utility and need for the billing strategy in use for DWH will be evaluated as part of the lessons learned from this event for use in future catastrophic incidents.

The Federal Agencies' completion of response operations necessarily follows in time after the initial obligation of funds, as does the collection and submission of costs to support reimbursement. DHS/CG Chief Financial Officers (CFOs) are working closely with other Federal Agency CFOs to expedite this reimbursement process.

We have no reason to believe actual costs will vary substantially from these estimates. The fact that 38.8% of the amounts obligated by Federal Agencies were reimbursed from the OSLTF as 9/30/2010 is in large part due to the fact that the bills accounted for obligations – rather than past expenses. Agencies continue to submit paperwork to support reimbursement on a rolling basis. For all activities that were approved in a MIPR or a PRFA, agencies are reimbursed out of the OSLTF at the time when they submit the paperwork, as would be standard for any reimbursable agency expense. DHS/CG Chief Financial Officers (CFOs) are working closely with other Federal Agency CFOs to help them expedite the reimbursement process.

## Enclosure V: Comments from the Department of Homeland Security

### USCG Comments on GAO Deepwater Horizon Oil Spill Preliminary Assessment dated November 8, 2010

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#### **The Per Incident Cap**

In respect to GAO draft conclusions regarding the \$1 billion per incident cap on Fund payments, we agree that enacting new legislation concerning the cap will be essential to ensuring established policies and procedures are fully and effectively implemented. In May 2010, the Administration asked Congress to increase the per-incident limit to \$1.5 billion. We appreciate GAO's input and look forward to working with Congress to address this important issue.

#### **Gulf Coast Claims Facility**

Designation was accepted and BP, one of the responsible parties (RPs), initially established and advertised a claims process. Subsequently, the Administration and BP mutually agreed that Kenneth Feinberg would run an independent claims process. Feinberg established the Gulf Coast Claims Facility, which took over claims operations on August 23, 2010. Claims previously filed with the BP claims process were transitioned to the GCCF for review, evaluation, and determination. Claimants have subsequently filed new claims with the GCCF. If an RP or the GCCF does not satisfy a claimant within 90 days of submission or if they deny the claim, that claimant may elect to pursue the claim in court or to submit the claim to NPFC for consideration of reimbursement from the OSLTF. The NPFC claims process applies the requirements of OPA and the implementing claims regulations in independently arrive at their own determination of compensability of claims. Reimbursement from RPs would be pursued for any claims compensated from the OSLTF.

BP also agreed to establish a \$20 billion trust to ensure that funds would be available for, among other things, claims designated for payment by the GCCF. The trust is administered by independent trustees.

#### **Integrated Services Team**

The Integrated Services Team (IST) was established as a part of the National Incident Command (NIC) on June 4, 2010 to coordinate the efforts of Federal Departments and Agencies on issues related to supportive services to individuals and local governments as well as claims monitoring. The IST had field-based teams stationed in each affected state to coordinate the IST's work in support of the State. Federal Resource Coordinators (FRC's) assigned to each state ensured coordination of information, issue resolution, and service delivery to those impacted by the spill.

The IST did not focus on the response and cleanup efforts being directed by the NIC. The IST coordinated interagency and intergovernmental efforts to independently monitor the status of claims submitted to the RPs and, once it was established, the GCCF, and the effectiveness and efficiency of their claims processes. The team took steps to raise awareness of concerns related to payment policy clarity for claimants, process efficiency and effectiveness, improved communication with claimants, data access and reporting,

## Enclosure V: Comments from the Department of Homeland Security

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and coordination of federal/state benefits and services to avoid duplicate payments. The IST also hosted conference calls to facilitate dialogue and information sharing between GCCF, BP and federal, state and local government officials. In conjunction with the stand-down of the NIC on September 30, IST capability has been scaled back, with reduced IST capability expected to continue through December 2010 for claims monitoring and coordination. Eventually, responsibility for coordination will be transitioned to other federal agencies under inherent authorities as appropriate. Formal claims monitoring functions will not go to the USCG National Pollution Funds Center.

#### **Notice of Designation**

There is confusion about the purpose and impact of a notice of designation. A RP is liable if he owns or operates a facility or vessel from which oil discharges or poses a substantial threat of discharge to waters of the U.S. Whether the RP accepts or denies designation does not affect ultimate liability. The purpose of designation is to get the RP to advertise the claims process as quickly as possible. If the RP denies designation the NPFC will advertise and will continue to pursue any RP for removal costs and damages subject to any OPA defense or limit of liability.

## **Enclosure VI: GAO Contact and Staff Acknowledgments**

### **GAO Contact**

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### **Staff Acknowledgments**

In addition to the contact named above, staff members who made key contributions to this report include Kim McGatlin, Assistant Director; James Ratzenberger, Assistant Director; F. Abe Dymond, Assistant General Counsel; Hannah Laufe, Assistant General Counsel; Jehan Abdel-Gawad; Mark Cheung; Donald Holzinger; David Hooper; Mark Kaufman; Jason Kelly; Matthew Latour; Chari Nash-Cannaday; Donell Ries; and Doris Yanger.

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